Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

HAROLD MORALES,

Petitioner,

v.

ROSANNE CAMPBELL, Warden, Mule Creek State Prison, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is this Court's decision in *Giles v. California,* — U.S. —, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008) retroactive to the time *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004) was decided?

2. Assuming this Court's decision in *Giles v. California* is retroactive to the time *Crawford v. Washington* was decided, where *Crawford* was decided while petitioner's direct appeal was still pending, would *Giles* be applicable to his case?

3. Were the homicide victim's prior complaints to four law enforcement officers that petitioner wished to harm or kill her "testimonial hearsay" under the Sixth and Fourteenth Amendment within the meaning of *Crawford v. Washington* and *Giles v. California*, which could not be introduced into evidence absent a prior defense opportunity to cross-examine the victim?

4. Assuming this Court's decision in *Giles v. California* is retroactive to the time *Crawford v. Washington* was decided, was the California Court of Appeal's decision that petitioner had forfeited his right to cross-examine the victim because he allegedly killed the victim contrary to or an unreasonable application of *Giles v. California*, where there was no evidence that petitioner killed the victim to prevent her from testifying?

5. Assuming that this Court's decision in *Giles v. California* is not retroactive to the time of *Crawford* v. Washington, was the Court of Appeal's decision that petitioner had forfeited his right to cross-examine the victim because he allegedly killed

the victim contrary to or an unreasonable application of *Crawford v. Washington*, in that *Crawford* established that this Court will not recognize any exception to the confrontation clause that did not exist at the time of the founding of the Constitution and the Court of Appeal made no attempt to show that its version of the forfeiture by wrongdoing rule existed at the time of the founding of the Constitution?

6. Were the admission of the statements subject to the harmless error rule, and if so, was such admission harmless?

LIST OF ALL PARTIES

Petitioner

HAROLD MORALES.

Respondents

ROSANNE CAMPBELL, Warden, Mule Creek State Prison.
PEOPLE OF THE STATE OF CALIFORNIA.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

Both the Ninth Circuit's decision affirming petitioner's appeal from the denial of his federal habeas corpus petition, and the California Court of Appeals' opinion affirming petitioner's direct appeal are unpublished.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: July 21, 2010 (memorandum decision).

2. Date of any order respecting rehearing: none

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

Federal Statutes

28 U.S.C. section 2254(d). An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...

State Statutes

California Evidence Code section 240.

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness o sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

California Evidence Code section 1370.

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following

conditions are met:

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.

(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or

motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

California Penal Code section 187.

(a). Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. . . .

California Penal Code section 188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought.

California Penal Code section 190.

(a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. . .

Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Related and similar cases

Petitioner had been advised that a petition for writ of certiorari will be filed from the Ninth Circuit's decision in *Ponce v. Felker*, Ninth Circuit Appeal No. 08-56218, reported at 606 F.3d 596 (May 24, 2010) involving the same issue of retroactivity of *Giles v. California*, — U.S. —, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008), but has not seen any indication that such a petition was ever filed.

3. Statement of the Case

a. Facts of Conviction and Custody.

Petitioner was convicted of first degree murder and sentenced on February 7, 2003 to a term of 26 years to life. He is presently in the custody of respondent Rosanne Campbell, Warden, Mule Creek State Prison, Ione, California. Petitioner is not on bail.

b. Proceedings at trial

Petitioner was tried for the October 8, 1988 homicide Nelva Omar [1] in a non-jury trial.

i. Witnesses to the crime

The events occurred during the evening of October 8, 1988, in Fremont, California, a city located on the eastern side of San Francisco Bay. There were no eyewitnesses to the actual stabbing. Petitioner did not testify.

Samuel Dorrough heard a woman scream three times and each time the scream was cut short. Dorrough also heard the voice saying "help me", and a honking horn. Dorrough later heard a sound like a car trunk closing three times, heard a car start up, saw headlights, and saw a red car coming out of a driveway. (ER 51-52.) [2]

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[1] Nelva Omar is referred to as "Nelva" in this brief to distinguish her from Zelika Omar, a prosecution witness.

[2] "ER" refers to the Excerpts of Record filed in the Ninth Circuit appeal.

Janeen Leech saw a red hatchback coming up Wilson Street with its passenger door swinging open. She then heard something hitting the ground. Leech then saw a man carrying what looked like a mannequin, which he then threw into the red car (ER 52.)

Gary Eoff saw a red car stopped with the door open. The driver got out, picked up a girl and threw her inside the car. The girl was not moving. (ER 52.)

Franklin Bryan heard a woman screaming "Oh, God, help", a man yelling, and a horn honking. He then heard something hit the ground near the car. He then saw a man get out of a car and try to force the passenger door closed. After the man got back in the car, Bryan heard some more arguing. (ER 52.)

Leech, Eoff, and Bryan did not identify petitioner as the man that they saw. Later, however, Paul Lightfoot, petitioner's stepfather, woke up to see petitioner cutting at his wrists and throat. Petitioner said that he'd done something terrible and the police would lock him up. (ER 52.)

Deputy Frank Buschhueter found a red hatchback parked on Aires Court with nobody inside, but lots of blood on the interior. He then heard a woman calling for help, saying that her son was trying to hurt himself. Buschhueter entered an apartment and saw petitioner trying to stab himself. Petitioner then ran to a balcony and dove to the ground. Petitioner was emotional and crying. (ER 52.)

Deputy Robert Burnham saw petitioner fall to the pavement from a balcony, get up and run away. Burnham

caught petitioner and handcuffed him. Petitioner had cut his throat very deeply and had severed an artery. (ER 53.)

Lieutenant Donna Jay looked inside the red hatchback and saw blood everywhere, a knife on the dashboard, and a purse with Nelva's license in it. (ER 53.)

Burnham and Jay then looked in the rear compartment of the red hatchback and found Nelva's body. She appeared to have been dead for some time.

ii. Scientific evidence

The coroner testified that Nelva's body had a skull fracture, blunt injuries to the head and face, bruises and abrasions, (ER 50), and twenty three knife wounds (ER 50-51.) The coroner described only one of the knife wounds as life threatening, a stab wound to the upper chest that was between 5½ and 6½ inches long that penetrated the lower lobe of Nelva's lung. The coroner described the other knife wounds as "superficial", "small", "cuts", or "scratches", or "affecting muscle tissue only" (ER 51.) The coroner could not match the wounds to any particular knife. (ER 51.) The cause of death was a skull fracture and the previously mentioned stab wound. (ER 51.)

The coroner could not determine whether there had been a struggle. The skull fracture could have been caused by a fall to the street. The wounds described as "cuts" could have been inflicted when Nelva had the knife in her hand during a struggle. (ER 51.)

The parties stipulated that a DNA analysis of the blood on

a serrated steak knife found in Nelva's car showed both petitioner's and Nelva's blood on it. No evidence or stipulations were presented concerning the origin or ownership of the knife. (ER 53.)

iii. Nelva's prior complaints to law enforcement.

The prior complaints were admitted under California Evidence Code section 1370, which allows the introduction of prior statements of a witness relating a threat or infliction of physical injury if the witness in unavailable. The defense unsuccessfully objected to the introduction of Nelva's prior complaints to law enforcement officers David Snider, Beverly Young, Huey Tran, and Jeffrey Andrade on grounds of hearsay and violation of petitioner's confrontation rights under the Sixth Amendment. (ER 58-59.)

March 14, 1998 incident: Alameda County Sheriff's deputy David Snider took a battery report at 5:35 pm from Nelva in a Safeway parking lot in Fremont, California. Nelva had been crying, was upset, and had a very slight scrape mark on the left eye, which Snider thought was "consistent with" an assault. Nelva told Snider that she had gotten into a fight with petitioner in the Safeway parking lot at about 11:00 am that day, during which petitioner struck her with his fist. Nelva declined to press charges. Nelva mentioned "a hundred previous assaults" but gave no details. Snider checked with dispatch, who told him that there had been no argument or fight reported in the Safeway parking lot that morning. (ER 53.)

April 14, 1998 incident: Hayward Police Officer Beverly Young was dispatched to Southland Mall in Hayward, California, at 8:30 pm to interview Nelva. Nelva was crying "hysterically" that petitioner had broken one of her car windows. Nelva told Young that petitioner called her on his cell phone, and when she refused to meet her by her car, said he would break the windows of her car. Nelva showed Young a bruise that she said that petitioner had made on her 4 days before, and said petitioner had beaten her "exactly 15 times" before. Young advised Nelva to get a restraining order, Nelva said that if she did, petitioner would kill her. There were no witnesses to anyone breaking the car window. No other witness reported anything. (ER 53-54.)

July 10, 1998 incident: Milpitas Police Officer Huey Tran interviewed Nelva at the Burlington Coat Factory in the Great Mall in Milpitas, California. Nelva told Tran that she'd broken up with petitioner eight months before, but gotten back together four days ago. She said that at about 9:30am that morning, petitioner called her and threatened to kill her. Then, around noon, petitioner went to her jewelry kiosk and threatened to kill her. She yelled at him, he threw a shoe at her, and the security officer chased him away. During Tran's interview, there was a call that Nelva said was from petitioner. Tran took phone and heard an angry male voice yelling obscenities. Tran told petitioner that he was a police officer. Petitioner said that he'd only been arguing with Nelva and hung up. There was another call which Nelva answered; Nelva then told Tran that it was petitioner saying that he hopes she died. (ER 54.)

Tran also interviewed two witnesses to the altercation,

Salvador Baron and Michael Savedra, who told Tran that they saw the shoe being thrown but that it was just an argument. Later, Nelva called the police department and recanted most of what she had told Tran. She said that she had told petitioner to "go to hell, fuck you" on the telephone and to "drop dead" and that she would "get him back" in person, and petitioner had only asked her what was wrong without making any death threats." (ER 54.)

August 2, 1998 incident: Alameda County Sheriff's deputy Jeffrey Andrade responded to a domestic violence call on August 2, 1998 at about 8:30 pm on Redwood Road in Castro Valley, California. Chief Norman Lapera of the East Bay Regional Parks Police was present, talking to Nelva. Nelva had a bruise on her neck and scratches, and was upset and crying. Petitioner had been arrested and was angry. After Chief Lapera left with petitioner, Nelva told Andrade that she and petitioner had been behind Southland Mall in Hayward, California, when an old high school friend said "hi" to her. Petitioner punched her, choked her, and said that he was going to kill both of them that night. Nelva Omar would not give the name of the witness that she said was an old friend. (ER 54-55.)

iv. Other testimony.

East Bay Regional Parks Police Chief Norman Lapera was stopped at a stoplight on Redwood Road at 8 pm alongside a maroon Honda. He saw Nelva in the passenger seat of the Honda, crying and saying "no" and "leave me alone." Petitioner was in the driver's seat. Petitioner took the woman by the back of the hair and put her in an arm bar choke hold.

She resisted and tried to grab petitioner's forearm. While Lapera was calling dispatch, Nelva got out of the car and got into Lapera's police car, crying and saying "help he's trying to hurt me." (ER 55.) Lapera ordered petitioner to get back in his car. Petitioner did so, drove through the intersection, and stopped when Lapera pulled him over. Petitioner then got out of his car, walked toward Lapera's car, and started yelling at Nelva to get back in his car. Lapera arrested and handcuffed petitioner. (ER 55.)

Wida Akbar saw Nelva on October 8, 1988 at about 4-5 pm. (RT 276-277.) Nelva told Wida that she wanted to go to the Spaghetti Factory that evening with petitioner, but couldn't make herself look really beautiful because appellant would kill her. (RT 276-280). (RT 280.) [3]

Zelika Omar, Nelva's sister, testified that on an unspecified evening, as she and Nelva were driving away from Zelika's home in Fremont, California, petitioner jumped out from the side of the bushes onto the hood of the car, jumped off, laughed, and said it was a joke. (ER 56-57.) On another occasion about five months before Nelva's death, she, Nelva, and petitioner were in Nelva's car in Castro Valley, California. Some yelling occurred and petitioner told Nelva he had it all planned out and if Zelika was there too he would take care of her too. (ER 56-57.) Zelika also said that she played about 30 telephone messages on Nelva's phone in which petitioner was yelling and saying he was going to "chop [Nelva's] body up and send it in a box to Nicaragua." Zelika did not produce any recorded messages or say when these messages were left. (ER

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[3] "RT" refers to the original reporter's transcript in the direct appeal.

56-57.)

Eleanor McDonald, a neighbor of Nelva's, testified that she had heard petitioner and Nelva arguing occasionally and had seen petitioner hit Nelva 2 years before she died. (ER 57.)

v. Closing argument

The prosecutor argued that Nelva's prior complaints to the police and petitioner's prior threats against her was evidence of premeditation, and that the multiple stab wounds showed that petitioner deliberated because he could have stopped whenever he wanted to. (ER 59.)

The defense agreed that the prosecution had proven a case of homicide, but not a case of premeditated first degree murder. The prosecution had the burden of of showing a lack of provocation and lack of unreasonable self-defense that would negate malice. Nelva's history of provoking petitioner was circumstantial evidence that she had acted in the same manner on October 8, 1998, and the evidence that Nelva had told defendant in the past that she was going to have her friends kick his ass was evidence that petitioner could have believed, albiet unreasonably, that he was in danger on October 8, 1998. (ER 59-60.) There was evidence that the two were sitting in the car quietly before the screaming was heard. Evidence that Nelva's body was partially nude when discovered suggested that the two had had sex in the car, which, if true, would tend to disprove a deliberate, premeditated first degree murder and tend to show that the killing resulted from a sudden argument. The coroner had testified that the knife wounds could have been inflicted in a matter of seconds, and that the cutting-type

wounds (as opposed to the stab wounds) were consistent with two people struggling over a knife. Dorrough's testimony that a matter of seconds had gone by between the first and second screams suggested a quick and volatile event. The blood from inside the car was never tested; there was no evidence about how much of it might have been petitioner's. There was no evidence about who brought the knife or where it came from, and that if it had been in the car before Nelva picked up petitioner, this would be evidence of reasonable doubt that petitioner had planned the murder in advance. (ER 59-60.)

In rebuttal, the prosecution argued that there was no specific evidence that Nelva's killing was the result of provocation or heat of passion, and no evidence that Nelva might have "done something to bring this on herself" except for petitioner's blood on the knife. It was "quite probable and quite likely" that petitioner had cut himself while stabbing Nelva. (ER 60-61.)

vi. The trial court's decision.

The court recognized that the issue was between voluntary manslaughter and murder in first or second degree, but found that petitioner had premeditated and deliberated based on the evidence of prior threats:

> "Does the evidence show beyond a reasonable doubt that Mr. Morales has premeditated the murder? Yes, it does. He had talked about the threat of murder before. He once had even beaten Miss Omar while driving during the - toward the empty reaches of Redwood Road, telling her he was taking her there to kill her.

> Perhaps the fortuitous intervention of Chief Perrea (sic) saved her. Perhaps Mr. Morales would not then have carried out his threats had he not been stopped. Because it is abundantly and overwhelmingly clear that he manifestly considered a proposed course of action before the action that ended Miss Omar's life."

(ER 61.)

The court did not discuss the issues of provocation or unreasonable self defense as they related to manslaughter. Instead, the court saw the issue as a choice between first and second degree murder, defining the choice as follows:

> "So here's the crux of the case. That Mr. Morales premeditated the murder of Miss Omar and that his use of the knife was willful is proven beyond a reasonable doubt. The Court is asked to accept on the one hand that based upon a volatile, demeaning, vicious and harsh relationship that Mr. Morales was pushed to the breaking point and that he killed upon an unconsidered and rash impulse. On the other hand, the Court is asked to find the killing was not only premeditated and willful but deliberate and not a rash impulsive response."

(ER 61.)

The court acknowledged that "something (might have) happened in the car to force a rash, impulsive act by Mr. Morales." but held there was "no evidence" to support this. The court found that petitioner's "threats and actions, recorded over several months by various individuals, showed

that he manifested the intention to unlawfully kill Nelva Omar." This showed that petitioner had deliberated the killing. (ER 61.)

c. Proceedings in the direct appeal.

Petitioner timely pursued a direct appeal and a state companion collateral relief petition. During the direct appeal, this Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004), which generally barred the introduction of "testimonial hearsay" unless the defense has had a prior right to cross-examine the declarant.

The California Court of Appeal acknowledged that Nelva's prior statements to the police were of the type generally barred by *Crawford* as "testimonial hearsay", but held that petitioner had forfeited his confrontation rights by killing Nelva and thus making her unavailable as a witness. The Court of Appeal relied on this Court's decision in *Reynolds v. United States*, 98 U.S. 145, 158-159, 25 L. Ed. 244 (1879), even though *Reynolds* had involved a defendant who deliberately procured the witness' absence, holding that *Reynolds*' forfeiture by wrongdoing rule did not require a showing that petitioner killed Nelva to prevent her from testifying. (ER 26.)

On October 26, 2005, the California Supreme Court denied review. Petitioner filed a timely federal habeas corpus petition on October 25, 2006.

d. Proceedings in the federal courts.

On February 13, 2008, the United States District Court for

the Northern District of California held that the Court of Appeal's decision that petitioner had forfeited his right to confront Nelva by killing her and thereby making her unavailable as a witness was neither contrary to nor an unreasonable construction of established U.S. Supreme Court decisional law, even in the absence of any evidence that petitioner had killed Nelva for the purpose of making her unavailable as a witness. (ER 25-27.)

Approximately three months after the dismissal and after petititoner had filed a timely appeal to the Ninth Circuit, this Court decided appealability, this Court decided *Giles v. California*, — U.S. —, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008.) Giles held that the forfeiture by wrongdoing rule required a showing that the defendant intended to prevent a witness from testifying.

On July 21, 2010, the United States Court of Appeals for the Ninth Circuit affirmed the district court in a two page memorandum decision. The decision was based on the Ninth Circuit's published opinion in *Ponce v. Felker*, 606 F.3d 596 (9th Cir. May 24, 2010) in which the Ninth Circuit held that *Giles v. California* is not retroactive.

Petitioner did not file a petition for rehearing or rehearing *en banc*. Petitioner was informed that the petitioner in *Ponce v. Felker* intended to file a petition for certiorari with this Court, but to date, has not been able to find any indication on this Court's docket that such a petition was ever filed.

ARGUMENT

1. The Supreme Court should grant certiorari because of the exceptional importance of determining the retroactivity of its decision in *Giles v. California*, — U.S. —, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008).

This case is of importance because the main issue is whether this Court's recent decision in *Giles v. California* , — U.S. —, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008) is retroactive. The only Federal Circuit to have ruled on the issue of *Giles'* retroactivity is the Ninth Circuit.

In so ruling, the Ninth Circuit undermined the rule of analysis of Confrontation Clause questions established by this Court in *Crawford v. Washington*. Before *Crawford*, this Court followed a rule based on "reasonableness", see *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Crawford* overruled *Ohio v. Roberts* and held that any exception to the Confrontation Clause would have to have existed at the time of the founding:

> "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."

Crawford v. Washingon, 541 U.S. at 54.

After *Crawford*, any exception to the Confrontation Clause, to be justified, had to be done so based on the scope of that right at the time of the founding. [4] The California Court of Appeal clearly did not attempt any historical analysis of the "forfeiture by wrongdoing" exception, however, basing its interpretation of *Reynolds v. United States* on two very recent cases, *United States v. Emery,* 186 F.3d 921 (8th Cir. 1999), and *State v. Meeks* (2004) 277 Kan. 609, 88 P.3d 789. By finding *Giles* non-retroactive, the Ninth Circuit, in essence, ruled that a court need not follow *Crawford's* historical analysis rule in analyzing an exception to the Confrontation Clause until this Court issues an opinion specifically dealing with that particular exception.

2. *Crawford* applies to petitioner.

This Court decided *Crawford v. Washingon* while petitioner's direct appeal was still pending. *Crawford* is thus applicable to petitioner. *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 1180-1181, 167 L. Ed. 2d 1 (2007.)

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[4] Since *Crawford,* the historical analys is of the Bill of Rights has played a major role in this Court's decisions. See, e.g. *Heller v. District of Columbia*, — U.S. —, 128 S. Ct. 2783; 171 L. Ed. 2d 637 (2008) and *MacDonald v. Chicago*, — U.S. —, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (both decisions holding that the historical meaning of the Second Amendment, to protect a personal right to keep and bear arms, controlled.)

3. Nelva's statements to the four law enforcement officers were "testimonial."

The California Court of Appeal assumed that Nelva's prior statements to law enforcement officers Snider, Young, Tran, and Andrade would qualify as "testimonial hearsay" under *Crawford v. Washington*. The district court described these statements as "potentially testimonial" (district court memorandum opinion, p. 19.) There appears to be no serious dispute that Nelva's reports of petty crimes and threats to law enforcement officers would be considered testimonial under *Crawford* and would not fall within the limited "exigency" exception of *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006.) Nelva's statements were all taken in the field by investigating officers when petitioner was not physically present and there was no ongoing emergency.

4. *Giles v. California* is retroactive to the time of *Crawford*.

a. *Crawford* established the rule that Confrontation Clause exceptions would not be recognized unless they existed at the time of the founding.

Crawford established a basic rule for determining whether an exception exists to the Sixth Amendment Confrontation Clause. After *Crawford*, the Court would only recognize those exceptions that were in existence at the time of the founding:

> "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the

> 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."

Crawford v. Washingon, 541 U.S. at 54, citing *Mattox v. United States*, 156 U.S. 237, 243, 39 L. Ed. 409, 15 S. Ct. 337 (1895).

The only exception discussed in *Crawford* was the historical "dying declarations" rule:

> "The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . If this exception must be accepted on historical grounds, it is *sui generis.*"

Crawford v. Washingon, 541 U.S. at 56, fn 6.

Thus, after *Crawford*, lower courts were on notice that they could not rely on exceptions to the Confrontation Clause that may have been judicially developed since the "the time of the founding."

b. *Giles v. California* was simply an application of *Crawford's* principle of analysis to the forfeiture by wrongdoing Confrontation Clause exception.

In *Giles v. California*, this Court identified the principle established in *Crawford* and stated that the issue facing the Court in Giles was simply "whether the theory of forfeiture by

wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right:

> "We held in *Crawford* that the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.' Id., at 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177. We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."

Giles v. California, 128 S. Ct. at 2682. By so framing the issue, this Court recognized that the analysis required was simply a specific application of the principle already established in *Crawford*.

c. By treating the "purposeful" version of the forfeiture by wrongdoing rule as established law, and California's version of the rule as a very recent departure, *Giles* implies retroactivity.

Giles v. California discussed the traditional version of the forfeiture by wrongdoing exception to the Confrontation Clause in the following manner:

> "The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying. The rule required the witness to have been 'kept back' or 'detained' by 'means or procurement' of the defendant. Although there are

definitions of 'procure' and 'procurement' that would merely require that a defendant have caused the witness's absence, other definitions would limit the causality to one that was designed to bring about the result 'procured.' . . . .

Cases and treatises of the time indicate that a purpose-based definition of these terms governed. A number of them said that prior testimony was admissible when a witness was kept away by the defendant's 'means and contrivance.' . . . . This phrase requires that the defendant have schemed to bring about the absence from trial that he 'contrived.' . . . .

An 1858 treatise made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness 'had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, in order to prevent him from giving evidence against him.' . . . .The wrongful-procurement exception was invoked in a manner consistent with this definition. We are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying, such as offering a bribe.

The manner in which the rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the

person from testifying – as in the typical murder case involving accusatorial statements by the victim – the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even argued that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial."

Giles v. California, 128 S. Ct. at 2683-2684.

The Court noted that a lack of a "purposeful" component to the forfeiture rule would have made the dying declaration exception to the Confrontation Clause unnecessary:

"Judges and prosecutors also failed to invoke forfeiture as a sufficient basis to admit unconfronted statements in the cases that did apply the dying-declarations exception. This failure, too, is striking. At a murder trial, presenting evidence that the defendant was responsible for the victim's death would have been no more difficult than putting on the government's case in chief. Yet prosecutors did not attempt to obtain admission of dying declarations on wrongful-procurement-of-absence grounds before going to the often considerable trouble of putting on evidence to show that the crime victim had not believed he could recover."

Giles v. California, 128 S. Ct. at 2686.

The Court finally observed that what they called

California's "proposed exception" to the right of confrontation did not even arise until very recently.

> "Not only was the State's proposed exception to the right of confrontation plainly not an 'exceptio[n] established at the time of the founding,' [*Crawford*] id., at 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177; it is not established in American jurisprudence since the founding. American courts never – prior to 1985 – invoked forfeiture outside the context of deliberate witness tampering.
>
> This Court first addressed forfeiture in *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879), where, after hearing testimony that suggested the defendant had kept his wife away from home so that she could not be subpoenaed to testify, the trial court permitted the government to introduce testimony of the defendant's wife from the defendant's prior trial. See id., at 148-150, 25 L. Ed. 244. On appeal, the Court held that admission of the statements did not violate the right of the defendant to confront witnesses at trial, because when a witness is absent by the defendant's "wrongful procurement," the defendant 'is in no condition to assert that his constitutional rights have been violated' if 'their evidence is supplied in some lawful way.' Id., at 158, 25 L. Ed. 244.. . . .
>
> *Reynolds* relied on these maxims (as the common-law authorities had done) to be sure. But it relied on them (as the common-law authorities had done) to admit prior testimony in a case where the defendant had

> engaged in wrongful conduct designed to prevent a witness's testimony. The Court's opinion indicated that it was adopting the common-law rule. It cited leading common-law cases – *Lord Morley's Case* [6 How. St. Tr. 769, 771 (H. L. 1666)], *Harrison's Case* [12 How. St. Tr. 833, 851 (H. L. 1692)], and [*Queen v.*] *Scaife* [117 Q. B. 238, 242, 117 Eng. Rep. 1271, 1273 (K. B. 1851)] – described itself as 'content with' the 'long-established usage' of the forfeiture principle, and admitted prior confronted statements under circumstances where admissibility was open to no doubt under *Lord Morley's Case*. *Reynolds, supra*, at 158-159.
>
> If the State's rule had an historical pedigree in the common law or even in the 1879 decision in *Reynolds*, one would have expected it to be routinely invoked in murder prosecutions like the one here, in which the victim's prior statements inculpated the defendant. It was never invoked in this way. The earliest case identified by the litigants and *amici curiae* which admitted unconfronted statements on a forfeiture theory without evidence that the defendant had acted with the purpose of preventing the witness from testifying was decided in 1985. *United States v. Rouco*, 765 F.2d 983 (CA11)."

Giles v. California, 128 S. Ct. at 2687.

This Court rejected California's claim that there was any historical support for its version of the forfeiture by wrongdoing exception to the Confrontation Clause, and held that allowing California to broaden this exception would be

contrary to *Crawford's* principles:

> "The State and the dissent note that common-law authorities justified the wrongful-procurement rule by invoking the maxim that a defendant should not be permitted to benefit from his own wrong. See, e.g., G. Gilbert, **Law of Evidence** 140-141 (1756) (if a witness was 'detained and kept back from appearing by the means and procurement' testimony would be read because a defendant 'shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong'). But as the evidence amply shows, the 'wrong' and the 'evil Practices' to which these statements referred was conduct designed to prevent a witness from testifying. The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them. There is nothing mysterious about courts' refusal to carry the rationale further. ***The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to 'dispensing with jury trial because a defendant is obviously guilty.'*** *Crawford*, 541 U.S., at 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177.

Giles v. California, 128 S. Ct. at 2686, emphasis added.

The Court finally concluded:

> "We decline to approve an exception to the Confrontation Clause ***unheard of at the time of the founding or for 200 years thereafter***."

Giles v. California, 128 S. Ct. at 2693, emphasis added.

In doing so, this Court treated the purposeful version of the forfeiture-by-wrongoing exception as the established rule and California's elimination of the purpose requirement as a new departure from this rule. By doing so, this Court implied that *Giles v. California* would have to be considered retroactive to the time of *Crawford*.

The most recent decision of this Court concerning retroactivity is *Whorton v. Bockting*, in which this Court held that *Crawford* itself was not retroactive to any earlier time. This Court stated the general principle of retroactivity, that a decision that sets forth an "old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 127 S.Ct at 1180. This Court further noted that "'the explicit overruling of an earlier holding doubtless creates a new rule'" *Whorton v. Bockting*, 127 S.Ct. at 1181, quoting *Saffle v. Parks*, 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), and on that basis, held that *Crawford* undoubtedly created a new rule because it specifically overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Id.*

This Court was undoubtedly correct in ruling that *Crawford* created a "new rule" for purposes of retroactivity. *Giles*, however, is different. *Giles* did not overrule any prior decision of this court. Instead, this court followed *Crawford*,

analyzed the forfeiture-by-wrongdoing exception as it was understood at the time of the founding and thereafter, and held that California's purposeless version of the rule was "unheard of at the time of the founding or for 200 years thereafter." *Giles v. California*, 128 S. Ct. at 2693. The "purposeful" version of the forfeiture-by-wrongdoing exception was thus not regarded as "new", but an old, established rule. It was California's departure from the forfeiture-by-wrongdoing exception that was the "new rule."

d. In determining that *Giles v. California* stated a "new rule", the Ninth Circuit improperly relied on cases that failed to follow the historical analysis principles dictated by *Crawford*.

The Ninth Circuit's decision in *Ponce v. Felker* is perhaps explained by the manner in which the retroactivity issue was presented to that court. The petitioner in *Ponce v. Felker* apparently argued that *Giles v. California* should be retroactive to the time of *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879). As discussed above, this Court, in *Giles*, indeed held that *Reynolds v. United States* adopted "the common-law rule" that prior testimony would only be admitted "where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony." *Giles v. California*, 128 S. Ct. at 2687. Petitioner here, however, argued only that *Giles* should be retroactive to the time of *Crawford*, since *Giles* was a specific application of the rule in *Crawford* that thereafter, this Court would recognize only those exceptions to the Confrontation Clause that were "established at the time of the founding." *Crawford v. Washingon*, 541 U.S. at 54.

Ponce v. Felker held that *Giles* stated a new rule because, prior to *Giles*, various courts had approved a non-purposeful version of the forfeiture-by-wrongdoing exception. Besides the California Supreme Court's opinion in *People v. Giles*, 40 Cal. 4th 833, 55 Cal. Rptr. 3d 133, 152 P.3d 433, 443 (Cal. 2007), the Ninth Circuit cited a single Federal Circuit level case, *United States v. Garcia-Meza*, 403 F.3d 364, 370-71 (6th Cir. 2005), and a handful of state cases: *State v. Moua Her*, 750 N.W.2d 258, 270-74 (Minn. 2008); *State v. Sanchez*, 2008 MT 27, 341 Mont. 240, 177 P.3d 444, 456 (Mont. 2008); *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396, 404 (Wash. 2007); *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311, 326 (W.Va. 2006); *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518, 535 (Wis. 2007), and *State v. Meeks*, 277 Kan. 609, 88 P.3d 789, 794 (Kan. 2004). *Ponce v. Felker*, 606 F.3d at 603-605.

While the existence of these cases may be relevant to whether *Giles* would be retroactive to the time of *Reynolds*, they would not be relevant at all to the issue of whether *Giles* should be retroactive to the time of *Crawford* – unless, following *Crawford's* requirement, they conducted a historical analysis to determine whether a purposeless version of the forfeiture-by-wrongdoing exception to the Confrontation Clause was "established at the time of the founding." *Crawford v. Washingon*, 541 U.S. at 54.

None of these cases even attempted the historic analysis dictated in *Crawford* to determine what version of the forfeiture-by-wrongdoing rule was established at the time of the founding. Indeed it is notable that, except for *State v. Jensen*, all of the cases cite *Crawford* for the statement that the forfeiture-by-wrongdoing rule "extinguishes confrontation

claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62, but do not even mention *Crawford*'s bedrock principle that, thereafter, this Court would only recognize Confrontation Clause exceptions that were "established at the time of the founding." *Crawford,* 541 U.S. at 54. All of these cases treated the issue as if the courts had the right to construe the forfeiture-by-wrongdoing rule as they saw fit, without reference to the scope of the exception at the time of the founding. Such an approach contradicts *Crawford* and is an unreasonable application of *Crawford's* "time of the founding" requirement for proposed Confrontation Clause exceptions. They are not examples of reasonable jurists disagreeing over the scope of the forfeiture by wrongdoing rule, *Caspari v. Bohlen*, 510 U.S. 383, 395, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994), since a reasonable jurist who sought to follow *Crawford* would have had to determine whether a non-purposeful version of the forfeiture-by-wrongdoing exception existed at the time of the founding.

The Sixth Circuit, in *United States v. Garcia-Meza,* 403 F.3d at 370-71. relied only on a prior Sixth Circuit decision, *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) and its own analysis of *Crawford* and *Reynolds*. *United States v. Garcia-Meza,* 403 F.3d at 370-71. *Cromer*, in turn, relied only on an opinion that it admitted was "postulated" by Professor [apparently Richard] Friedman in a pre-*Crawford* law review article. *Cromer, id.* at 679.

State v. Moua Her, 750 N.W.2d at 270, relied on a previous Minnesota case, *State v. Langley*, 354 N.W.2d 389, 400 (Minn. 1984), which appears to have arrived at the conclusion that the exception does not require a showing of purpose on its own.

State v. Sanchez, 341 Mont. at 252, treated the case as a matter of first impression and relied primarily on *United States v. Garcia-Meza*. *State v. Mason*, 160 Wn.2d at, 926 does not appear to rely on any prior authority but bases its opinion that "specific intent to prevent testimony is unnecessary" on general equitable grounds. *State v. Mechling*, 219 W. Va. at 381, relied on a depublished, non-citeable California case, *People v. Romero*, 26 Cal. App. 4th 315 (1992), that did not even discuss forfeiture-by-wrongdoing but only held that domestic abuse can cause a battered women to be afraid.

The court, in *State v. Jensen*, 727 N.W.2d at 533-534, was the only one of the cases relied on in *Ponce v. Felker* that even acknowledged that *Crawford* established the rule that Confrontation Clause exceptions would not be admitted unless they were "established at the time of the founding", *id.* at 534, but the *Jensen* court thereafter conducted no analysis to determine what version of the forfeiture-by wrongdoing exception was, in fact, "established at the time of the founding." Instead, the court relied on *State v. Meeks* and *United States v. Garcia-Meza*. *Id.* at 533-534.

In *State v. Meeks*, 277 Kan. at 615, the court relied on a 1997 law review article by Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Israel L. Rev. 506 (1997) that argued for forfeiture without the need for showing a purpose to prevent a witness from testifying. *State v. Jensen*, 727 N.W.2d at 533, also mentioned this article, but acknowledged that Professor Friedman was "one of the first to argue for a broad forfeiture by wrongdoing doctrine" in the 1997 article.

Finally, concerning *People v. Giles*, this Court stated in

Giles v. California, 128 S. Ct. at 2687:

> "Not only was the State's proposed exception to the right of confrontation plainly not an 'exceptio[n] established at the time of the founding,' id., at 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177; it is not established in American jurisprudence since the founding. American courts never – prior to 1985 – invoked forfeiture outside the context of deliberate witness tampering."

People v. Giles did not inquire as to the state of the forfeiture by wrongdoing exception at the time of the founding.

Apparently in response to the above holding in *Giles*, the Ninth Circuit set forth an unusual definition of what constitutes "new law" for retroactivity purposes:

> "Moreover, although *Giles* itself traced the intent requirement back to common law, it also acknowledged that post-1985 forfeiture cases and state evidence codes do not all require proof of intent. 128 S. Ct. at 2687-88 & n.2. *Giles* thus represented a ***departure from this more modern trend*** regarding the forfeiture exception. The holding of *Giles* is a new rule for *Teague* purposes."

Ponce v. Felker, 606 F.3d at 603-604. *Ponce* appears to acknowledge that *Giles* restated a principle that would have been "old law" prior to 1985! The Ninth Circuit does not cite any decision of this Court establishing that an "old rule" can become a "new rule" for retroactivity purposes simply because

a few lower courts disagree with it, [5] or how what it termed the "more modern trend" became "old law" for purposes of retroactivity when this Court never purported to follow this "modern trend" in any of its decisions.

5. The erroneous admission of the prior statements was either not subject to the harmless error rule or was not harmless.

In its memorandum decision, the Ninth Circuit did not reach the issue of whether prejudice needed to be shown if admission of Nelva's prior statements to law enforcement was error, or whether admission of such statements would have been prejudicial. Petitioner raises these issues here to avoid any question of inadvertent waiver.

Petitioner was tried by the court, however, not a jury, and the court explicitly relied on Nelva's prior statements to the police both to find the premeditation and deliberation components of first degree murder and to find that Nelva's killing was not the result of provocation that could render petitioner's culpability for killing Nelva less than first or even second degree murder. See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142. This case was like a jury trial in which the court has directed a verdict on one or more of the elements of an offense, to which the harmless error rule does not apply. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460

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[5] Since many of these cases rely on the 1997 law review article by Professor Friedman, *Confrontation and the Definition of Chutzpa*, petitioner wonders whether a single law professor can transmute "old law" into "new law" simply by writing an article.

(1986), *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

But even assuming the harmless error rule applies, the admission of the prior statements was not harmless. The evidence showed that petitioner intentionally killed Nelva, but an intentional killing can be either a first or second degree murder or a voluntary manslaughter under California law. Respondent would have to show that no reasonable trier of fact would have failed to find premeditation, deliberation, and a lack of provocation sufficient to reduce Nelva's killing to second degree murder or voluntary manslaughter. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Without the prior statements, the trier of fact would have been left with the bizarre, questionable testimony of Nelva's sister Zelika, hardly an unbiased witness, and the cororner's testimony that all but one of the knife wounds were "small" or "superficial" (RT 93-100) suggesting that they were inflicted in a random explosion of violence inconsistent with premeditation, deliberation, or a lack of provocation. *People v. Alcala* (1984) 36 Cal.3d 604, 626 ("a brutal manner of killing is as consistent with a sudden, random explosion of violence as with calculated murder.") There was no direct evidence of premeditation, and while such an intent could have been inferred had the evidence showed that petitioner brought the knife with him, there was no such evidence, either.

Under such circumstances, respondent could not have shown that admission of the prior statements was harmless beyond a reasonable doubt.

CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case. The language in *Giles* was about as clear a statement that the purposeful version of the forfeiture-by-wrongdoing exception was an "old rule" as one is likely to find in an opinion of this Court not explicitly deciding the issue of retroactivity. To allow the lower courts to hold, by default, that *Giles* is not retroactive to the time of *Crawford*, based on a handful of opinions that failed to follow *Crawford's* requirements concerning analysis of Confrontation Clause exceptions, would simply be to encourage lower courts to ignore the decisions of this Court.

Dated: Oakland, California, Tuesday, October 12, 2010.

Robert J. Beles Paul McCarthy

Robert Joseph. Beles Paul Gilruth McCarthy

Attorneys for *Petitioner* HAROLD MORALES

APPENDIX

1. Opinions, Orders, Findings of Fact, and Conclusions of Law, Whether Written or Orally Given and Transcribed, Entered in Conjunction with the Judgment Sought to Be Reviewed

2010 U.S. App. LEXIS 15039, *

HAROLD MORALES, *Petitioner - Appellant*,

v.

ROSANNE CAMPBELL, *Warden, Respondent - Appellee*,
PEOPLE OF THE STATE OF CALIFORNIA,
Real-party-in-interest - Appellee.

No. 08-16294

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

2010 U.S. App. LEXIS 15039

June 29, 2010, Submitted **

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
July 21, 2010, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
Appeal from the United States District Court for the Northern District of California. D.C. No. 3:06-CV-06645-MHP. Marilyn H. Patel, District Judge, Presiding.

Morales v. Campbell, 2008 U.S. Dist. LEXIS 10597 (N.D. Cal., Feb. 13, 2008)

DISPOSITION: AFFIRMED.

COUNSEL: For HAROLD MORALES, Petitioner - Appellant: Robert Joseph Beles, Oakland, CA; Paul McCarthy, Attorney, ROBERT J. BELES LAW OFFICES, Oakland, CA.

For ROSANNE CAMPBELL, Warden, PEOPLE OF THE STATE OF CALIFORNIA, Respondents - Appellees: Sharon Birenbaum, Deputy Attorney General, AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, San Francisco, CA.

JUDGES: Before: ALARCON, LEAVY , and GRABER , Circuit Judges.

OPINION

MEMORANDUM *

FOOTNOTES

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

California state prisoner Harold Morales appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Morales contends that the trial court violated his Sixth Amendment rights by admitting statements by the woman he was convicted of murdering. Morales argues that *Giles v. California*, 128 S.Ct. 2678, 171 L. Ed. 2d 488 (2008), applies retroactively, or alternatively, the state court's application of the "forfeiture by wrongdoing" doctrine [*2] was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court at the time of his appeal. These contentions are foreclosed. See *Ponce v. Felker*, 606 F.3d 596 (9th Cir. 2010).

AFFIRMED.

2. Any Other Opinions, Orders, Findings of Fact, and Conclusions of Law Entered in the Case by Courts or Administrative Agencies

a. District Court opinion

2008 U.S. DIST. LEXIS 10597

HAROLD MORALES, Petitioner,
v.
ROSANNE CAMPBELL, Warden, Respondent.
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.

No. C 06-06645 MHP

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 10597; 75 Fed. R. Evid. Serv. (Callaghan) 883

February 13, 2008, Decided
February 13, 2008, Filed

SUBSEQUENT HISTORY: Affirmed by *Morales v. Campbell*, 2010 U.S. App. LEXIS 15039 (9th Cir. Cal., July 21, 2010)

PRIOR HISTORY: *People v. Morales*, 2005 Cal. LEXIS 11917 (Cal., Oct. 26, 2005)

COUNSEL:

[*1]

For Harold Morales, Petitioner: Robert Joseph Beles, LEAD ATTORNEY, Paul Gilruth McCarthy, Law Offices of Robert J. Beles, Oakland, CA.

For Rosanne Campbell, Warden, Mule Creek State Prison, Respondent: Sharon G. Birenbaum, Deputy Attorney General, San Francisco, CA.

JUDGES: MARILYN HALL PATEL, United States District Court Judge.

OPINION BY: MARILYN HALL PATEL

OPINION

MEMORANDUM & ORDER Re: Petition for Writ of Habeas Corpus & Motion for Evidentiary Hearing Harold Morales, a prisoner at the Mule Creek State Prison in Ione, California, filed this petition for writ of habeas corpus under *28 U.S.C. section 2254*. This matter is now before the court for consideration on the merits. For the reasons discussed below, the petition will be DENIED.

OVERVIEW On June 30, 1999 the Alameda County District Attorney charged petitioner Morales, pursuant to *California Penal Code section 187*, with the murder of Nazaneen "Nelva " Omar ("Omar"). The information did not specify whether the charge was for murder in the first or second degree. Petitioner was also alleged to have used a deadly and dangerous weapon in violation of Penal Code *section 12022(b)* and to have

intentionally and personally inflicted great bodily injury in violation of

[*2]

section 1203.075 and *12022.7(d)*. CT 289-90 1. On October 3, 2002 petitioner waived his right to a jury trial and, following a bench trial, he was convicted of all charges. Id. at 473; 493-94. He was sentenced on February 7, 2003 to a term of twenty-five years to life with the possibility of parole. Id. at 519-20, 553-54.

1 "CT " refers to the clerk's transcript of petitioner's state court trial, which this court received as Exhibit A in support of Respondent's Opposition Brief. "RT " refers to the reporter's transcript of the trial, which this court received as Exhibit B in support of Respondent's Opposition Brief.

Petitioner pursued state direct appeal and state habeas corpus review with the California Court of Appeal, which affirmed Petitioner's conviction and denied the habeas petition. Resp.'s Opp., Exh's. C-I. Most recently, petitioner timely pursued a petition for review with the California Supreme Court. Id., Exh. J. The California Supreme Court dismissed petitioner's claims without prejudice until such time as the Court reached a decision in People v. Cage, case number S127344 2, interpreting the *Confrontation Clause of the Sixth Amendment*. Id., Exh. K. The issue in Cage was whether

[*3]

an ostensible victim's statements to a police officer in response to general investigative questioning constitutes testimonial

hearsay under *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).* Petitioner claims the decedent's statements to law enforcement officers were testimonial hearsay and therefore inadmissible because petitioner had no opportunity to cross-examine the declarant.

2 The California Supreme Court actually referred to case number S12737. This case number was assigned to a related case, but appears to have been referenced in error.

In anticipation of re-filing with the California Supreme Court, petitioner waited one full year subsequent to dismissal, but ultimately bypassed this last stage of state review and filed the petition now before this court on October 25, 2006--immediately prior to the expiration of the period of limitation for such relief. An opinion was subsequently issued in the matter of People v. Cage on April 9, 2007, but the State does not challenge this petition on exhaustion grounds.

Petitioner now makes a variety of claims related to his Due Process rights and his right to a fair trial under the *Sixth Amendment*. He also requests that the court grant a writ of

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habeas corpus on the basis of cumulative error supported by these claims.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this habeas action for relief under *28 U.S.C. section 2254. 28 U.S.C. § 1331.*

Petitioner was convicted and sentenced in Alameda county, which lies in the Northern District of California. Therefore, this court has jurisdiction over his claims. *28 U.S.C. §§ 84, 2241(d).*

EXHAUSTION

I. Basic Requirement

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies. See *28 U.S.C. § 2254(b), (c).* Either by direct appeal or through collateral proceedings, the prisoner must give a state's highest court an opportunity to rule on the merits of each and every claim the prisoner seeks to raise in federal court. See *O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).*

When, however, it would be futile or create undue delay to strictly adhere to the requirement, it is appropriate for a district court to entertain a petitioner's claims on the merits despite incomplete exhaustion. See *28 U.S.C. § 2254(b)(1)(B)* (writ may be granted when

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"there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant"). Moreover, "a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available

in the courts of the State," although the court is not required to do so. *28 U.S.C. 2254(b)(2); Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999).*

In analyzing exhaustion, a federal court should evaluate whether a prisoner's claims were exhausted at the time they were filed, rather than when the court ultimately addresses the claims. *Brown v. Maass, 11 F.3d 914, 915 (9th Cir. 1993).*

II. Finality of the State Proceedings

Petitioner characterized the dismissal without prejudice by the California Supreme Court of his direct appeal and collateral relief petition as a final decision qualifying for exhaustion purposes pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The State does not challenge this characterization.

This court holds that petitioner's characterization of the dismissal as final is incorrect, but it acknowledges that the statute of limitations

[*6]

imposed by AEDPA created a unique predicament in this action. The statute mandates that a "1-year period of limitation shall apply to an application for 3 a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." *28 U.S.C. § 2244(d)(1).* The period of limitation begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id. *§ 2244 (d)(1)(A).* Here, this

period of limitation began to run from the date the California Supreme Court issued its dismissal, October 26, 2005, and ultimately expired prior to the Court's final disposition in Cage, on April 9, 2007. Petitioner filed for relief with this court on October 25, 2006, prior to the expiration of the AEDPA period of limitations. Had he waited for an opportunity to exercise his last available state remedy, he would have forfeited his opportunity to access his federal remedy. See, e.g., *Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)* (Oregon petitioner who filed for state post-conviction relief within state two-year statutory period was not permitted to proceed on federal habeas action).

This court refuses

[*7]

to make petitioner choose between his state and federal remedies. The exhaustion requirement, while necessary, becomes unduly burdensome if applied in a manner that strips petitioner of his opportunity to seek federal habeas review. Petitioner waited until the last possible day prior to the expiration of the statutory period to file his habeas petition with this court. This demonstrates that he waited in good faith for an opportunity to exercise his state remedy until the final date practicable.

Because of the unique procedural circumstances of the case, this court will review petitioner's claims on the merits. Specifically, the court will review the findings of the California Court of Appeal as to each of petitioner's claims since that court was the last to issue a decision on the merits.

STANDARD OF REVIEW

I. Habeas Corpus Review

This Court may entertain a petition for writ of habeas corpus "[on] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2254(a)*. The petition may not be granted with respect to any claim that was adjudicated on

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the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. *§ 2254(d)*. Petitioner has the burden to prove the violation by a preponderance of the evidence. *Silva v. Woodford, 279 F.3d 825, 835 (9th Cir. 2002)*.

Under AEDPA, state court rulings are to be evaluated under a "highly deferential" standard of review. *Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)* (per curium). Decisions challenged as unreasonable applications of Supreme Court law must not merely be erroneous, but "objectively unreasonable." *Lockyer v. Andrade, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. Where the state court does not provide a reasoned decision, this court performs

"an 'independent review of the record' to ascertain whether the state court decision was objectively unreasonable." *Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003)* (citing *Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).*

Furthermore,

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this court analyzes claims of harmless error on habeas petitions pursuant to the standard adopted in *Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).* See *Morales v. Woodford, 336 F.3d 1136, 1148 (9th Cir. 2003)* (applying Brecht review). The court considers harmful only those errors shown to have a "'substantial and injurious effect or influence in determining a jury's verdict.'" *Brecht, 507 U.S. at 637* (quoting *Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).* In other words, only error from which petitioner can establish "actual prejudice" will survive harmless error analysis. Id. (citing *United States v. Lane, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986)).*

Finally, this court presumes factual findings of a state court to be correct, and the burden falls upon petitioner to rebut this presumption by clear and convincing evidence. *28 U.S.C. § 2254(e)(1).* Factual findings made by state courts, whether trial or appellate, are given this deference. *Rushen v. Spain, 464 U.S. 114, 120, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)* (per curium); *Tinsley v. Borg, 895 F.2d 520, 526 (9th Cir. 1990).* However, where a petitioner challenges a state court's findings based entirely on the state record, the "unreasonable

determination" standard of *28 U.S.C. section 2254(d)(2)*

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must be applied. *Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004).*

II. Due Process

Decisions of state courts involving application of state law cannot be upset on federal habeas review unless they "so fatally infected the proceedings as to render them fundamentally unfair" in violation of petitioner's right to due process. *Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986).* When a state court applies a state standard stricter or functionally equivalent to a corresponding federal standard, this court will defer to the state court's determination. *Stephens v. Hall, 294 F.3d 210, 214-15 (11th Cir. 2002); Cox v. Burger, 398 F.3d 1025, 1030 (8th Cir. 2005); Owens v. Frank, 394 F.3d 490, 501 n.7 (7th Cir. 2005); McCambridge v. Hall, 303 F.3d 24, 35 (1st Cir. 2002).*

FACTUAL BACKGROUND

Petitioner dated Omar for approximately two or three years prior to stabbing her to death on October 8, 1998. RT 226, 229. Omar's sister, Zelika, described the relationship between her sister and petitioner as "sick" and "crazy". Id. at 228. At petitioner's trial, she described seeing bruises on her sister and witnessing petitioner verbally abuse Omar. Specifically, she had also listened to numerous voice

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mail messages petitioner had left for her sister, in which he screamed threats such as "watch out, bitch, I'm going to cut you up. I'm going to fuck you up. I'm going to cut your body, chop you up . . . and you think I'm a fucking joke. I'm not. Just you watch." Id. at 256. She also described petitioner alluding to killing both sisters, saying he had "everything planned out " and "if you're there too, Zelika, I'm going to take care of you too." Id. at 234-58.

Petitioner's stepfather, Paul Lightfoot, who lived with petitioner at the time of the killing, testified that petitioner and Omar used bad language, had problems in their relationship and were mutually abusive both verbally and physically. Id. at 371-74. Lightfoot relayed that prior to the killing petitioner told him that Omar had obtained a restraining order against him and that he was concerned about going to jail over a case Omar had filed against him. Id. at 380-82. About six months prior to the killing, a neighbor witnessed petitioner yell at Omar, grab her and hit her on the head while Omar cried hysterically. Id. at 215-16. On four separate occasions Omar called the police in response to violent or threatening acts by the

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petitioner. Id. at 58, 62, 141-48, 157-63, 184, 522-37. In addition, Michael Tong, an acquaintance of petitioner, acknowledged having made a statement to the police about an incident in which petitioner told him that he had tried to choke Omar. Id. at 191, 198.

Omar and Zelika both attended Heald College, and Zelika testified that her sister had planned to stop dating petitioner when she started classes, but petitioner had nonetheless remained a part of Omar's life--confronting her at school, following her, and discouraging her from her studies by telling her she was a loser and would not make it through her first quarter. Id. at 254-58. On the day of the killing, Omar had just completed that first quarter. A friend Omar was living with, Wida Akbar, testified that Omar was going out to dinner with petitioner to celebrate. Id. at 277, 279. Akbar also testified that Omar told her that she could not dress up too much or make herself look really beautiful because petitioner would kill her. Id. at 279-80.

Samuel Dorrough heard Omar's screams at 8:00 p.m. He testified he had heard three screams--each cut short--coming seconds apart from a red hatchback, and that the car horn was blowing. Id. at 290-98.

[*13]

After leaving to call 911 and returning to the vicinity of the car, he testified he heard what sounded like someone trying to close a car truck with something preventing the latch from catching. Id. at 298. He saw only a man in the car at this point, and watched the car drive down the street, hesitate, and turn down the road. Id. at 298-302. Other neighbors heard the same horn-honking and screaming. Id. at 475-76. Frank Bryan testified to seeing two people in the car moving around and hearing frantic screaming--a woman yelling, "Oh, God, help," and a man yelling. Id. at 476-78, 491. Bryan heard keys being thrown from the car at one point, saw the man get out, walk

around the car and struggle to forcefully close the passenger door. Id. at 478-80.

Janeen Leech and Gary Eoff both saw petitioner run a stop sign while speeding down Redwood Road around 8 p.m. Id. at 319-20, 349-51. Leech heard a thud, saw petitioner get out of the car and scoop up what would later be determined to be Omar's body and throw it back in the car. Id. at 323-25. Eoff also saw petitioner bending over to pick a limp, unmoving Omar up off the ground and throw her in the car. Id. at 349-51. After petitioner resumed

[*14]

driving, Leech could see a spatter of red on the passenger window, which prompted her to call 911. Id. at 321-22, 327. When officers arrived at the location, they found a puddle of blood. Id. at 328.

Petitioner's stepfather, Lightfoot, was awakened by his wife shortly after these events. Petitioner was in the hallway of their home slicing his throat and wrists with a knife. Id. at 376-77. Lightfoot attempted to physically restrain petitioner, and testified that while doing so, petitioner said, "Please don't stop me. I've done something terrible and the police and going to lock me up." Id. at 378. At that point police officers arrived at the residence. Id. at 379. They recovered the keys to the red hatchback. Id. at 470. Officers who inspected the car found a large amount of blood and a bent knife on the dashboard of the vehicle. Id. at 394-95, 452-54, 497. When officers asked petitioner--who was covered with blood from his self-inflicted wounds, was behaving irrationally and had been strapped to a

backboard--the whereabouts of the girl, petitioner was non-responsive. Id. at 421-26, 500-03. After being repeatedly asked, petitioner told the officers that he and his girlfriend had just

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broken up and that she had overdosed on sleeping pills because she was upset. Id. at 426-28.

Omar was eventually found in the back of the hatchback. Id. at 430, 452. An autopsy revealed that Omar had suffered 23 stab and incise wounds to her upper back, left shoulder, left arm, upper chest, lower chest, lower left abdomen and her face and neck. Id. at 93-99. One wound to her upper chest penetrated her lung, which caused bleeding to her chest cavity and leakage of air from her lung, which without medical attention, would have alone been fatal. Id. at 105-06, 132. She also suffered blunt force injuries to her head, face, legs and back, including a skull fracture in the back of her head, consistent with a fall, which alone could also be fatal without immediate medical attention. Id. at 89-90, 104, 106-07. The forensic pathologist determined the cause of Omar's death to be shock and hemorrhage due to the multiple stab and incise wounds and blunt head trauma. Id. at RT 106.

DISCUSSION

Petitioner Morales cites four categories of error he believes violated his rights to Due Process in violation of the *Fourteenth Amendment* and to a fair trial under the *Sixth Amendment*. He claims: (1) the state

[*16]

trial court made "instructional errors" when determining sentencing; (2) the state trial court erred in its evidentiary rulings--allowing evidence that should have been excluded to be admitted, while excluding admissible evidence; (3) he was unduly prejudiced by prosecutorial misconduct during the closing arguments of his trial; and (4) he received ineffective assistance of counsel. This court will address each category of error in turn, and will then weigh the cumulative effect of any demonstrated errors. I. Instructional Errors As a general matter, "judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)*, overruled on other grounds by *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*). A trial court judge need not explain his or her reasoning in reaching a particular decision, *Arizona v. Washington, 434 U.S. 497, 517, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)*, and in instances in which the record does not indicate the standards used by the court, the court is presumed to have applied correct legal standards, *Wainwright v. Witt, 469 U.S. 412, 431, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*.

Morales claims the state trial judge erred in the following ways: (1) improperly defined the terms "premeditation,"

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"deliberation" and "unconsidered rash impulse," (2) failed to

consider the defense of "unreasonable belief of self defense," (3) incorrectly ruled that there was no evidence of provocation or of a "rash, impulsive act " and (4) improperly required the defense to show evidence of provocation or a rash impulse. The State counters that the trial court judge in this case issued no "instructions" because petitioner waived his right to a jury trial and the court is presumed to have applied correct legal standards. Further, it argues that the trial court applied appropriate legal standards and definitions, considered relevant defenses--including imperfect self defense--and reasonably found no evidence of provocation on the victim's part. The State ultimately asserts that the errors, if any, are harmless.

The California Court of Appeal rejected each of petitioners claims relating to reliance on legal error. It found that the trial judge applied appropriate legal standards, reached reasonable conclusions based on the evidence available and sufficiently considered unreasonable self defense. This court considers each of petitioner's claims in turn.

A. "Premeditation" and "Deliberation"

Petitioner

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first argues that the trial court erred in its definition of the terms "premeditation" and "deliberation." Without citation to the record, he specifically faults the trial judge for considering petitioner's past deliberations as to whether he should kill his victim as opposed to deliberations related to the particular

instance in which he actually killed her. He cites *California Jury Instruction ("CALJIC") 8.20* 3, which requires "the proposed course of action"--the actual killing--to be "considered beforehand." The portion of the jury instruction petitioner appears to refer to currently reads as follows: The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against *the proposed course of action.* The word "premeditated'" means *considered beforehand.* If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the

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first degree.

CALJIC 8.20 (emphasis added).

3 In its entirety, *CALJIC 8.20* reads as follows:

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

The word "willful," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or

determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The

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true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill.

Petitioner also argues that the trial court misapplied a three-category analysis for determining premeditation and deliberation outlined by the California Supreme Court in *People v. Anderson, 70 Cal. 2d 15, 26-27, 73 Cal. Rptr. 550, 447 P.2d 942 (1968)*. The Anderson analysis focuses on three types of evidence: (1) planning activity, (2) motive and (3) manner of killing, and that court held that first degree murder is supported "when there is evidence of all three types" or "at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *Id.* Petitioner contends that no evidence of either the first or second

[*21]

type existed in the trial record, and that the trial judge improperly considered prior threats he made against Omar not as circumstantial evidence of motive but as proof of premeditation and deliberation. He contends that the abstract desire to kill does not constitute planning activity and that no other evidence of planning activity was presented to the court. And, he argues that because there was no pattern to the cuts and slashes on his victim's body and only a few stabs were deep, the injuries are more consistent with a sudden explosion of violence than a calculated murder.

Based on his view of the Anderson factors as mandatory to a finding of premeditated murder, petitioner, citing *Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999)*, argues his due process rights were violated when the trial court convicted him without finding, beyond a reasonable doubt, every necessary element to support the conviction. This, he argues, was not harmless error because such a finding is contingent upon the additional

determination that sufficient evidence supports the trial court's verdict.

The State maintains that petitioner misrepresents the trial court's premeditation analysis. The trial judge, it

[*22]

argues, cited not only petitioner's past general threats to kill Omar but evidence of his prior attempt to kill her only two months earlier, 4 the volatile, demeaning, vicious and harsh relationship petitioner had with Omar as well as her own actions immediately prior to her death, which a witness had testified were aimed at pleasing petitioner rather than inviting an angry response. 5 The State also argues that petitioner improperly relies on an erroneous challenge of the trial court's application of state law. The State cites the California Supreme Court's more recent statements interpreting the Anderson factors in *People v. Perez, 2 Cal. 4th 1117, 9 Cal. Rptr. 2d 577, 831 P.2d 1159 (1992)*, which it argues advises against accepting petitioner's reading of Anderson.

4 East Bay Regional Park Police Chief Norman LaPera testified having pulled up next to petitioner and Omar on Redwood Road at Castro Valley Boulevard on August 2, 1998, where he could hear Omar crying, saying "no " and "leave me alone," and that when he made eye contact with her, she mouthed the words "help me. " RT 522-28, 532. He further testified that he stopped petitioner's vehicle, at which time he witnessed Omar run from the car to the back seat of his

[*23]

own car while petitioner ran towards her, saying he was going to hurt her and swearing at her. Id. at 529-530. Upon pulling into a strip mall at the side of the intersection, Omar continued to cry and told LaPera several times that petitioner had told her he was driving up the road to kill her. Id. at 531-32. Once both vehicles were parked, LaPera said petitioner continued to yell at Omar and ultimately had to be restrained and placed in another police car. Id. at 535-36. LaPerla testified that Omar continued to be upset, and repeatedly stated petitioner was taking her up the road to kill her. Id. at 535. Omar had a three-inch abrasion on the back of her neck and a smaller one on the front of her neck, as well as superficial scratches on her neck and wrists. Id. at 179. In his discussion of premeditation, the judge stated, "[petitioner] once had even beaten Miss Omar while driving during the -- toward the empty reaches of Redwood Road, telling her he was taking her there to kill her. Perhaps the fortuitous intervention of Chief Perrea [*sic*] saved her." CT 506.

5 The judge stated that "[t]he evidence shows that Miss Omar, in a celebrating frame of mind, dressed in party clothes, was planning

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on a special night out with her boyfriend . . . . She dressed in clothes that were specifically chosen not to upset Mr. Morales." CT 507-08.

The California Court of Appeals agreed with the State's analysis of the law, explaining that in Perez the California Supreme Court held that the specific categories described in

Anderson were not a "sine qua non to finding first degree premeditated murder, nor are they exclusive." Resp.'s Opp., Exh. I at 8 (quoting *Perez, 2 Cal. 4th at 1125*). Instead, the California Supreme Court said that "Anderson did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation" and it treated the categories as guidelines for determining whether a killing has been the result of "careful thought and weighing of considerations for and against the proposed course of action." *Perez, 2 Cal. 4th at 1123, 1125*. Proceeding in a manner consistent with *Perez*, petitioner's trial judge stated that he had "made reference to guiding principles referenced in CALJIC, " that for a killing to be deliberate "it must have been formed as a result of careful thought and weighing

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of considerations for and against the proposed course of action" and that "the true test of deliberation is the extent of reflection." CT 504-07. Based on this, the appellate court affirmed the trial court's application of state law.

In reviewing the manner in which the trial judge applied the appropriate state law to the facts, the appellate court noted that petitioner "had threatened to kill [his victim] by 'cutting' her, virtually the same manner in which he committed the murder." Resp.'s Opp., Exh. I at 8. It also cited the fact that he had stabbed her 23 times, "including a wound to the chest that alone would have been fatal," citing *People v. Hillery, 62 Cal. 2d 692, 703-04, 44 Cal. Rptr. 30, 401 P.2d 382 (1965)*, and *People v. Perrotta, 224 Cal. App. 2d 498, 505, 36 Cal. Rptr. 813*

(1964), for the propositions, respectively that "plunging a lethal weapon into the chest evidences a deliberate intention to kill" and "severe and numerous wounds require[] more than a fleeting period of time to inflict." The appellate court concluded that the nature and extent of the injuries petitioner inflicted on his victim coupled with his prior threats of violence supplied sufficient evidence in the record to justify the trial court's finding of premeditation

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and deliberation.

This court finds nothing unreasonable in the California Court of Appeal's interpretation of the facts, and petitioner has not argued that the state law is inconsistent with federal standards for determining the existence of premeditation or that the state standard is less protective of his rights. 6 Instead, petitioner argues that Perez and other cases interpreting the Anderson factors should be considered factually distinguishable from his case because specific evidence of unhurried or calculated action was more plentiful in those cases. See, e.g., *Perez, 2 Cal. 4th at 1126* (defendant had parked car away from victim's home, "surreptitiously entered," and in the course of killing broke one knife and had taken pause to retrieve a second), *People v. Sanchez, 12 Cal. 4th 1, 18, 47 Cal. Rptr. 2d 843, 906 P.2d 1129* (defendant and accomplice cooperated--one helping to restrain while the other stabbed). However, this court is required to give appropriate deference to reasonable findings of fact and applications of state law by the state trial court. It is not this court's role to re-evaluate the facts based on petitioner's disagreement with the state court's

analysis. Nor is it proper for this court to second-guess

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the state appellate court's application of state law. Therefore, this court holds that the state proceedings were not so flawed as to have been fundamentally unfair in violation of petitioner's due process rights.

6 The State correctly argues that the law applied conforms to the equivalent federal law for determining premeditation. Specifically, the State points to *United States v. Free, 841 F.2d 321, 325 (9th Cir. 1988)*, in which the Ninth Circuit held that premeditation may be established by "circumstantial evidence and inferences drawn from it," including but not limited to consideration of a defendant's "prior relationship to the victim, the defendant's carrying of the murder weapon to the scene, and the manner of the killing."

B. "Unconsidered Rash Impulse"

Petitioner claims, again without citation to the record, that the trial judge equated "unconsidered rash impulse" with "lack of provocation" in discord with *CALJIC 8.20* and state law. *CALJIC 8.20*, petitioner relays, emphasizes the contrast between cold, calculated judgment and decision with an unconsidered rash impulse. He asserts that finding a lack of provocation is not sufficient to support finding deliberation and premeditation,

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and he thus argues that because instructions that a reasonable juror could interpret as shifting the burden of proof violate due process, his rights have been so violated.

The State relies upon the Court of Appeal's determination that this argument is without merit because, on the whole, the trial court's statements show no misunderstanding of the law. The State cited the trial judge's relevant remarks that "[t]he Court is asked to accept on the one hand that based upon a volatile, demeaning, vicious and harsh relationship that Mr. Morales was pushed to the breaking point and that he killed upon an unconsidered and rash impulse." Resp.'s Opp., Exh. I at 9. The appellate court concluded that such remarks "reflect that [the trial court] considered the evidence presented in light of the theories presented and determined that the killing constituted first degree murder." Id. Petitioner argued at trial that his tumultuous relationship with his victim should be considered evidence that he may have had reason to become angry with her and suddenly engage in an unpremeditated act of violence against her. The appellate court reasonably interpreted the trial court's comments as referring to petitioner's

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own theory of the case.

Moreover, the trial judge stated that there was "overwhelming direct and circumstantial evidence that the critical element of expressed 'malice aforethought [was] proven beyond a reasonable doubt.'" CT 509. The State provides the court

elaboration on this point:

Omar suffered 23 stab wounds on her face, neck, back and chest. There was evidence that petitioner was jealous of Omar and did not want her to look too beautiful. The wounds to her face show a deliberated and calculated intent to disfigure her. Omar screamed and honked the horn several times when petitioner was attacking her; each time her screams were cut short. There was also evidence that Omar attempted to get out of the car to escape the attack: petitioner got out of the car, went to the passenger side, and struggled to close the door. After petitioner drove from the scene, Omar fell from the car. Petitioner callously picked her up and literally threw her motionless body back in the car.

Resp.'s Opp. at 22.

Petitioner's trial was before a judge, not a jury. The trial judge is presumed to have understood correct legal standards in the absence of evidence in his statements to the contrary. In light of

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the evidence on record and theories presented by petitioner at his trial, the appellate court reasonably concluded that no statements of the trial judge indicate the court misunderstood the law. It was therefore appropriate that the appellate court rejected petitioner's claim, and this court will similarly deny relief.

C. Defense of "Unreasonable Belief of Self Defense"

Petitioner next contends that the trial court did not adequately consider evidence of unreasonable or imperfect self defense. For support, petitioner cites to *People v. Uriarte, 223 Cal. App. 3d 192, 198, 272 Cal. Rptr. 693 (1990)*, which requires that a judge instruct a jury on the meaning of the defense where some evidence has been presented to support it. He claims that testimony from witnesses that the victim at some time told petitioner she would "kick [his] ass," and the fact that some of petitioner's blood was found on the knife which he used to stab her, should have sufficed to require an instruction about the defense.

The State maintains that the only evidence petitioner presented regarding Omar's ability to do him harm was that she had at some point in their relationship told him she had "the capability through friends and family

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to have his ass kicked." RT 752. Omar herself was five feet, one inch tall and weighed only 110 pounds. Id. at 159. Petitioner appears to have presented no evidence as to what could have made him either rationally or irrationally fearful of his victim on the evening of the killing. DNA testing admitted during the trial did indicate petitioner could not be excluded from "minor types of blood" collected from the knife used in the killing; however, the State points out that many of the stab wounds petitioner inflicted on Omar required "a great deal of force"--so much so that "the blade of the knife was bent"--so it would not be unreasonable to conclude that he might have incurred some minor cuts, which would have caused some amount of his blood to end up on the knife. Id. at 132, 454.

Further, the State suggests that imperfect self defense is essentially equivalent to finding that a killing was a form of voluntary manslaughter, and that the court was not required to consider sua sponte this lesser included offense because of a lack of substantial evidence that defendant killed Omar in unreasonable self defense.

The Court of Appeals cited the trial court's statement that it was "convinced

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beyond a reasonable doubt that the wounds were not inflicted in self-defense," and it stated it was satisfied that the trial court properly applied and followed the law. Resp.'s Opp., Exh. I at 10. It cited California Evidence Code ("CEC") *section 664*, which in relevant part provides: "[I]t is presumed that official duty has been regularly performed." Id. at 9.

Again, the appellate court conducted the appropriate analysis; a judge sitting in place of a jury is presumed to know the law. *Walton, 497 U.S. at 653*. Petitioner's reliance on *Uriarte* is nonsensical in the context of appeal from a bench trial, in which there is no jury to instruct. The only question is whether the judge himself considered correct legal standards and weighed the evidence correctly, and nothing in the trial record indicates he did not. Rather, the trial court appears reasonably to have concluded that self defense--reasonable or otherwise--was not the motivation of defendant's actions based on the weight of the evidence. Petitioner stabbed Omar no less than 23 times, the strikes were wilfully inflicted upon her back, front, and face, and time elapsed between cuts. CT 506. There

is no indication that the court failed

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to entertain petitioner's defense or consider relevant evidence. For these reasons, this court finds the Court of Appeal's rejection of petitioner's claim appropriate.

D. Evidence of Provocation or of a "Rash, Impulsive Act"

Petitioner argues next that the trial court erred in finding no evidence of provocation or of a rash, impulsive act. He suggests that because witness accounts that Omar's screams during the killing came 10 to 15 seconds apart and because he was extremely distraught after the killing, evidence existed which supported impulse. He claims the trial court erred in requiring proof of provocation to support a finding that he acted in a rash, impulsive manner, and he argues that the trial court impermissibly shifted the burden of proving he acted in a rash, impulsive manner to the defense in violation of his due process rights.

The State contends petitioner takes the trial court's words out of context. The Court of Appeal agreed with the State and rejected petitioner's claim. At trial, petitioner relied on his own assertion that some provocation sparked the rash, impulsive act of killing. In context, the trial judge stated:

Several scenarios have been proposed. Defense suggested [*34] the evidence shows a volatile, physical, abusive and self destructive relationship. And something happened in the car to force a rash, impulsive act by Mr. Morales. While of course,

possible, there is no evidence to support this version. While acknowledging a mercurial temperament, all the evidence points to a vibrant young woman out for a happy celebration.

CT 508.

The appellate court held that the trial court's comments "[do] not demonstrate that the court placed the burden upon defendant of introducing direct evidence of provocation in the car " but that the trial court "was simply reviewing the evidence and theories presented and giving its conclusion that the evidence failed to support defendant's theory." Resp.'s Opp., Exh. I at 10. The court reasonably deemed the relevant statements made by the trial judge to be a rejection of petitioner's theory that Omar provoked him to act in a rash, impulsive manner--not a requirement that petitioner prove an act of provocation to demonstrate impulsive behavior sufficient to escape a first degree murder conviction. Id. This court agrees. Petitioner's contention that there was some evidence supporting a rash act which the trial court ignored

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is not supported by the record; rather, as the state courts both found, the weight of the evidence in the case, much of which has already been discussed, convinced the trial judge beyond a reasonable doubt that petitioner committed premeditated and deliberate murder. Petitioner was not forced to carry an inappropriate burden; he failed to raise sufficient facts to negate the prosecution's showing. Because this court finds the determination by the appellate court to be reasonable, petitioner's argument fails and no error is assigned.

II. Evidentiary Determinations

Petitioner asserts that the trial court impermissibly: (1) admitted harmful testimonial hearsay evidence of his deceased victim; (2) admitted a similarly damaging prior statement given to the police by Michael Tong; and (3) excluded evidence of Omar's past violent acts. The State argues that: (1) admission of statements previously made by Omar to police were reasonable pursuant to *CEC section 1370*; (2) petitioner waived objections to the admission of Michael Tong's statements; and (3) the trial court properly excluded evidence of the victim's alleged prior violent conduct. The Court of Appeal reviewed petitioner's claims, and

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determined that the trial court committed no error.

A. Admission of Omar's prior statements

At trial, Nelva Omar's statements made to the police about prior acts of misconduct by petitioner on four separate occasions were admitted into evidence pursuant to *CEC section 1370*. 7 These statements narrated threats made by petitioner to Omar at various times. CT 422. Petitioner has challenged the admission of these statements, claiming a violation of his right of confrontation under the *Sixth Amendment* because he had no opportunity to cross-examine Omar about the statements. 8

7 *CEC 1370* provides for the introduction into evidence the hearsay statements of a declarant "if all of the following

conditions are met":

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would

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indicate its trustworthiness.

8 Petitioner did not object to the admission of these statements at trial on the basis of inability to confront because at the time of trial the Supreme Court had not yet decided *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. As the state appellate court held, it is appropriate to excuse this lack of objection on the basis that such objection would have been "unsupported by substantive law then in existence." *People v. Welch, 5 Cal.4th 228, 237, 19 Cal. Rptr. 2d 520, 851 P.2d 802 (1993)*. This court, however, considers the facts of petitioner's case in light of the rules of confrontation set forth in *Crawford* because that case was decided while petitioner's direct state appeal was pending. See *Linkletter v. Walker, 381 U.S. 618, 627, 85 S. Ct. 1731, 14 L. Ed. 2d 601*

(1965) ("a change in law will be given effect while a case is on direct review").

The State contends that admission of the prior statements was reasonable because petitioner forfeited his right of confrontation, and alternatively, the statements were properly admitted under the standard set forth in *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, as refined by the United States and California Supreme Courts in *Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)*, and *People v. Cage, 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007)*.

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The State further argues any potential error was harmless because the question of Morales' identity as the person who killed Omar was not at issue. In response to the State's forfeiture argument petitioner urges this court to impose a specific intent requirement into the equitable rule of forfeiture. Petitioner claims he cannot be deemed to have forfeited his right to confrontation unless he killed Omar in order to specifically keep her from testifying at trial. In support of this position, petitioner cites *Federal Rule of Evidence ("FRE") 804(b)(6)*, which requires a showing that the party against whom a statement has been offered "has engaged or acquiesced in wrong-doing that was intended to, and did procure the unavailability of the declarant as a witness." Petitioner cites to various cases and official commentary to the rule which bolster the argument that *FRE 804(b)(6)* requires a specific intent to make a witness unavailable.

The Court of Appeal deemed petitioner's right of confrontation forfeited pursuant to Crawford and Reynolds, and cited cases from other circuits to illustrate the appropriateness of the forfeiture exception despite a lack of specific intent to make the witness

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unavailable. 9 Resp.'s Opp., Exh. I at 10-13. This court agrees with the appellate court's conclusion and finds that petitioner forfeited his right to confront Omar when he killed her.

9 The court cited *United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999)*, and *State v. Meeks, 277 Kan. 609, 88 P.3d 789, 794 (Kan. 2004)*.

Petitioner's forfeiture argument, although superficially logical, is untenable because petitioner errs by conflating the common law rule of equitable forfeiture of the right of confrontation with the more recently developed and distinct *FRE 804(b)(6)*. The rationale for rejecting petitioner's argument was succinctly stated by the California Supreme Court in the case of *People v. Giles, 40 Cal. 4th 833, 55 Cal. Rptr. 3d 133, 152 P.3d 433 (2007)*. 10 That court recognized that the United States Supreme Court reaffirmed an equitable forfeiture exception to the right of confrontation in Crawford, as it was originally defined in the case of *Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1879). Id. at 840-41*; see also *Crawford, 541 U.S. at 62 n. 9* ("rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"). The court then reasoned that equity should not allow another

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to take advantage of his or her own wrong; and, additionally, explained that the equitable rule referred to in Crawford is one of forfeiture, rather than waiver, and therefore does not require the same element of intent that must be shown to trigger application of *FRE 804(b)(6). Giles, 40 Cal. 4th at 849-49* (citing *Reynolds, 98 U.S. at 159* ("no one shall be permitted to take advantage of his own wrong" and "if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is submitted to supply the place of that which he has kept away")); *United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005)* (Supreme Court's rationale for affirming rule of forfeiture "strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive."); *United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)* ("forfeiture" and "waiver" are distinctly different terms); *Freytag v. Commissioner, 501 U.S. 868, 894-95, 111 S. Ct. 2631, 115 L. Ed. 2d 764* ("Waiver, the 'intentional relinquishment or abandonment of a known right or privilege' is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver.") (citations omitted)).

10 This court notes, but does

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not rely on, the holding in Giles. The court agrees with the analysis put forth by the Giles court and cites it for illustrative purposes.

The equitable principle of not rewarding wrongdoing and recognizing that the exception at issue is one of forfeiture rather than waiver both negate requiring specific intent to make a witness unavailable when a defendant has caused the unavailability of that witness. When an exception to the hearsay rule would otherwise make a statement admissible, the *Confrontation Clause* does not stand as a bar if the defendant is responsible for the unavailability of the declarant.

Here, it is undisputed that petitioner killed Nelva Omar. Although statements made on at least three of the four occasions in question were potentially testimonial in nature, the statements were all properly admitted pursuant to CEC section *sections 1370* and *1240*. 11 This court finds that the state appellate court correctly found that petitioner suffered no constitutional error by the admission of Omar's statements at trial.

1 i The court notes, but finds no need to address, petitioner's objection based on *People v. Kons, 108 Cal. App. 4th 514, 133 Cal. Rptr. 2d 520 (2003)*, that *CEC section 1370* has been deemed

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not to qualify as a firmly rooted, reliable hearsay exception under the test of Ohio v. Roberts because that test is no longer applicable. The Court of Appeal noted that, based on the evidence in the record, the trial court did not err in ruling that the statements were sufficiently trustworthy to meet the fourth requirement for admission under *1370*. It found that the trial court reasonably deemed the statements trustworthy

for this purpose based on the lack of pending litigation, the fact that Omar's injuries were consistent with her complaints, and that although she "may have had bias or motive for fabrication due to her increasingly volatile relationship with [petitioner], her demeanor at the time of the reports suggested she was more likely to be credible." Resp.'s Opp., Exh. I at 13-14. B. Admission of Michael Tong's statements

Petitioner argues that the trial court impermissibly admitted a prior statement by Michael Tong--a former highschool classmate of petitioner--made to the police in October 1998. The statement acknowledged that he had met petitioner's girlfriend--most likely Omar--and provided some minimal description about her. It also acknowledged that petitioner had told

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Tong he suspected his girlfriend of cheating, and that during an argument petitioner had thrown his girlfriend on the bed, began to choke her and considered smothering her with a pillow. RT 198. The statement was admitted because Tong testified that although he remembered talking to sheriff deputies on several occasions and recalled meeting petitioner's girlfriend, he did not recall speaking to the police on the particular date when the statement was made. Tong maintained that he probably made and signed a statement about petitioner, and that the statement was truthful. The trial court admitted the statement pursuant to *CEC section 1237* as a past recollection recorded. 12 Petitioner argues that admission under *section 1237* was inappropriate because Tong had been a drug user for nearly 10 years and that his

statement was not fresh.

12 *CEC 1237* provides:

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement

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is contained in a writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement. (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

The State asserts that petitioner explicitly waived objection to the admission of Tong's statement so he is therefore

procedurally barred from complaint. Alternatively, it argues that the admission of Tong's statement was not prejudicial because petitioner was able to and did cross-examine Tong about the statement. Moreover, the State argues any error that might be assigned should be deemed harmless because Tong's statement was only one of many pieces of evidence demonstrating petitioner had been physically abusive and threatening towards Omar.

The Court

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of Appeal accepted the State's waiver argument. It relied upon the fact that although petitioner initially moved to strike Tong's testimony on redirect, wherein Tong admitted he told the deputy sheriff the facts in his statement, petitioner subsequently appears to have withdrawn the initial objection. Resp.'s Opp., Exh. I at 15. After the parties had rested, the Court of Appeal noted that in the context of discussion about evidentiary motions, and specifically in relation to Tong's testimony, the prosecution stated, "I don't know if counsel is still objecting to the admissibility of that testimony," and that in reply, petitioner's counsel said "No." Id. The appellate court also cited the trial court's statement that "[t]here being no objection, there's no issue." Id.

This court finds no error in the appellate court's determination that waiver occurred at trial. The conclusion was reasonable based on the cited statements made by counsel and the trial court judge, and the result does not impose any stricter standard than is recognized by federal law. See *Peretz v. United*

States, 501 U.S. 923, 936-37, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) ("No procedural principal is more familiar to this Court than that a constitutional

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right may be forfeited in criminal as well as civil cases by the failure to make timely assertions of the right before a tribunal having jurisdiction to determine it.")

C. Exclusion of Omar's prior conduct

Petitioner argues that the trial judge erred in not admitting evidence regarding a particular instance in which Omar struck and injured another individual with her car during a dispute with another girl in high school. He cites *CEC section 1103*, which provides that evidence of a character trait may be introduced through evidence of a specific instance of conduct. 13 The State argues that the evidence was appropriately deemed irrelevant and unduly prejudicial by the trial court, and excluded within the court's discretion. 13 *CEC 1103* provides: (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(2) Offered by the prosecution

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to rebut evidence adduced by the defendant under paragraph (1).

The trial court excluded the evidence for lack of relevance because it did not relate directly to Omar's relationship with petitioner, didn't touch upon her credibility, and because, having occurred three years prior, it was too remote in time to show that Omar had any significant propensity for violence. The court concluded that because the testimony would have "negligible weight" it would be "ultimately meaningless." RT 718.

The Court of Appeal upheld the trial court's determination. It held that *CEC section 352* allows a trial court to preclude admission of evidence pursuant to *section 1103* if "the evidence and the danger of prejudice, confusion and undue time consumption" substantially outweigh the probative value of the evidence. Resp.'s Opp., Exh. I at 15-16. Acknowledging the California Supreme Court's statement in *People v. Wright, 39 Cal. 3d 576, 588, 217 Cal. Rptr. 212, 703 P.2d 1106 (1985)*, that "the danger of these evils" must "substantially outweigh the probative value of the evidence," the appellate court then reviewed the trial court's decision for abuse of discretion, citing *People v. Rodriguez, 20 Cal. 4th 1, 9-10, 82 Cal. Rptr. 2d 413, 971 P.2d 618 (1999)*, and determined that

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because there was already ample evidence that Omar and petitioner were abusive toward one another and argued

frequently and because the testimony was "weak and contradicted in cross-examination," the trial court had properly ruled the evidence inadmissible.

The State argues that although the *Sixth* and *Fourteenth Amendments* guarantee petitioner a meaningful opportunity to present a complete defense, not every unfavorable evidentiary ruling, even if erroneous, is a constitutional deprivation, and that "the Constitution permits judges to exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)* (internal quotations omitted); *Montana v. Egelhoff, 518 U.S. 37, 42-43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)* (defendants do not have unfettered right to offer evidence); *Dowling v. United States, 493 U.S. 342, 352-54, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)* (prejudice of evidentiary ruling determined by rules of evidence rather than concept of due process); *Jammal v. Van De Kamp, 926 F.2d 918, 919 (9th Cir. 1991)* ("We are not a state supreme court of errors; we do not review questions of state evidence law. On federal habeas

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we may only consider whether the petitioner's conviction violated constitutional norms.")

The appellate court's determination appears to have been reasonable in light of the state rule of evidence applied, which does not appear to violate any federal constitutional standard. Petitioner has failed to show that the court's admission was for any reason so unfair as to have violated his right to due

process. Therefore, this court declines to find any error in the appellate court's approval of the trial court's discretionary decision to exclude the evidence.

III. Prosecutorial Misconduct

Petitioner next asserts that he was unduly prejudiced by several statements made by the prosecutor during the closing arguments, which he argues denied him his right to a fair trial. Specifically, petitioner claims the prosecutor: (1) accused defense counsel of presenting a bad-faith defense; (2) appealed to passion and prejudice--urging the judge to overlook the law; and (3) imposed testimony by body language by commenting on petitioner's demeanor when sitting in court.

The State argues that petitioner's claim is procedurally barred because petitioner failed to object at the time of the alleged misconduct.

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Moreover, the State asserts that if considered on the merits--even if viewed cumulatively--any comments the prosecutor made should be considered harmless because there was no prejudicial effect upon the bench trial proceedings.

The Court of Appeal found for the State on the basis of petitioner's failure to object, citing *People v. Cunningham, 25 Cal. 4th 926, 1000-01, 108 Cal. Rptr. 2d 291, 25 P.3d 519 (2001)* (a claim is preserved only when a defendant timely object and requests a curative admission), and *People v. Scott, 15 Cal. 4th 1188, 1217, 65 Cal. Rptr. 2d 240, 939 P.2d 354*

(1997) (same is true in a proceeding before the court rather than a jury). The court also deemed the prosecutor's statements--although acknowledging that some were improper 14--harmless because during this bench trial the judge was less likely to be significantly affected by the prosecutor's statements. Moreover, the court addressed the merits of each of petitioner's particular claims, and found that only one of the three was actually misconduct. 14 The prosecutor commented on petitioner's courtroom demeanor--saying that petitioner had a "smug little look on his face" and was pouting--in a manner that petitioner argued below constituted unfair comment on his choice not to testify.

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The appellate court acknowledged that these comments were improper pursuant to state law, citing *People v. Boyette, 29 Cal. 4th 381, 434, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (2002).*

Petitioner asserts that the following comments by the prosecutor in rebuttal argument improperly implied that defense counsel fabricated a defense: "The defense knows perfectly well that the evidence in this case is that this is a crime of murder. The defense knows perfectly well that this is not a manslaughter. There is no evidentiary basis to support manslaughter. This is a murder." RT 780. Petitioner cited two California Supreme Court cases and one state appellate court case for precedent to support the claim that the prosecutions comments about bad-faith defense were misconduct: *People v. Bain, 5 Cal. 3d 839, 847, 97 Cal. Rptr. 684, 489 P.2d 564 (1971)*; *People v. Nolan, 126 Cal. App. 623, 641, 14 P.2d 880 (1932)*; and *People v. Perry, 7 Cal. 3d 756, 789, 103 Cal. Rptr.*

161, 499 P.2d 129 (1972). However, the Court of Appeal--citing the more recent California Supreme Court case *People v. Hill, 17 Cal. 4th 800, 819, 72 Cal. Rptr. 2d 656, 952 P.2d 673 (1998)*--found that on this point the prosecutor had merely made "fair comment on the evidence." In Hill, the Court held that "[c]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is

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prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." Id. The Court further explained that

a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. A prosecutor may vigorously argue his case and is not limited to "Chesterfieldian politeness", and he may use appropriate epithets . . . .

Id. This court finds the prosecutor's statements to be vigorous advocacy and holds that the appellate court below was not unreasonable in finding petitioner's statements proper in light of *Hill*.

Petitioner's claim that the prosecution appealed to the trial

judge's passion and prejudice is also misguided. Petitioner points to the prosecutor's statement that petitioner's defense was merely an "intellectual exercise" and a "charade." However, petitioner cites cases

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which condemn calls for a jury to "make a statement," *United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005)*, "send a message" to society at large, *United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991)*, or "be the conscience of the community" when such appeal is "specifically designed to inflame the jury," *United States v. Koon, 34 F.3d 1416, 1443 (9th Cir. 1994)*. These cases are factually distinguishable from petitioner's and therefore do not lend support to petitioner's argument. The Court of Appeal reasonably determined the statements did not constitute misconduct but merely critiqued defense counsel's presentation of the case.

As for comments with regard to petitioner's passive courtroom demeanor, petitioner cites to *United States v. Schuler, 813 F. 2d 978, 979 (9th Cir. 1986)*, and other cases in which several circuit courts have deemed it reversible error to allow comment on a defendant's off-the-stand behavior. However, the Court of Appeal did not deny this behavior was misconduct; it found that such misconduct was not prejudicial because, unlike cases such as Schuler where improper comments were made to a jury, the comments made before the judge at petitioner's

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bench trial could not be presumed to have the same prejudicial

effect.

This court finds that the Court of Appeal properly analyzed petitioner's misconduct claims. It followed California Supreme Court precedent in determining that petitioner's failure to raise objection at the time the statements were made precludes his subsequent challenge of the statements, and this result does not conflict with federal law. Additionally, the appellate court nonetheless analyzed each of petitioner's claims, but based on the reasons mentioned found only one claim to have merit. This court is satisfied with the appellate court's ultimate conclusion that even that claim--were it not barred by petitioner's failure to object--could not be considered harmful because under the Brecht standard, petitioner must show that the trial judge was significantly influenced by the prosecutor's comments; in light of the overall record, this court cannot say that such actual prejudice occurred.

IV. Ineffective Assistance of Counsel

The *Sixth Amendment* guarantees criminal defendants the right of "effective assistance of counsel." *Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* (quotation omitted). Counsel is required

[*55] to provide "reasonably effective assistance" from an objective standpoint. *Id. at 687.* In Strickland, the Supreme Court defined the test for determining whether effective assistance of counsel has been denied:

First, the defendant must show that counsel's *performance was deficient.* This requires showing that counsel made errors so

serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. Second, the defendant must show that the *deficient performance prejudiced the defense*. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. (emphasis added).

A. Petitioner's Claims

Petitioner's ineffective assistance of counsel claim is based on two allegations of failure on his attorney's part. First, that his counsel did not object to inappropriate comments made by the prosecutor during closing arguments of petitioner's trial; and second, that his attorney failed to investigate the origin

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of the weapon petitioner used in the commission of his crime. Petitioner contends that his counsel's failure to object could not have been an intentional strategic decision, and he argues that the failure to investigate foreclosed the possibility that counsel might have discovered evidence undermining the government's proof of premeditation and deliberation.

The Court of Appeal rejected petitioner's claims of ineffective assistance of counsel, finding that counsel's failure to object was not prejudicial because "any prosecutorial misconduct was

harmless." Resp.'s Opp., Exh. I at 19. As to the failure to fully investigate the origin of the murder weapon, the appellate court determined that "[t]he facts alleged in the petition do not prove that defense counsel failed to investigate the origin of the knife; only that he did not ask defendant's mother about the issue," that "counsel was not ineffective in not pursuing the origin of the knife with defendant's mother," and that even if counsel had been ineffective in this regard, "evidence of the origin of the knife would not have had an effect on the verdict in view of the overwhelming evidence of premeditation and deliberation." Id.

This

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court has already deemed any error resulting from the prosecutor's closing statements was reasonably deemed harmless by the state appellate court. For the same reasons, the court finds reasonable the appellate court's determination that the failure to object to the statements was harmless.

This court also finds reasonable the appellate court's determinations regarding the claim of failure to investigate. The appellate court correctly applied the Strickland standard, and in doing so determined that petitioner did not allege facts that if proven true would demonstrate prejudice. Resp.'s Opp., Exh. I at 18-19. Petitioner contends that if it could be shown that the knife he used to kill Omar had been in her car, it would suggest he had not planned to kill Omar. Although this court acknowledges the same is a reasonable inference, petitioner merely suggests that a declaration from his mother

"did tend to show" he had not brought the knife because it "was a serrated kitchen knife, petitioner was living at his mother's house at the time of the killing, and his mother declared that no knives were missing from her kitchen." Pet's Reply in Support of Motion for Evid. Hearing at 5. That the common

[*58]

kitchen knife may not have come from his mother's home does not negate the possibility that petitioner obtained it from any number of places other than Omar's car. Moreover, even if petitioner found the knife in Omar's car, petitioner has not shown that the trial court would have drawn petitioner's desired inference in light of all of the other evidence presented at trial. Absent this showing, this court finds the Court of Appeal's holding that any failure to investigate did not rise to the level of ineffective assistance of counsel, or if it did it was nonetheless harmless, was reasonable.

B. Petitioner's Motion for Evidentiary Hearing

On September 27, 2007 petitioner filed a motion for evidentiary hearing pursuant to *Rule 8 of the Rules Governing Section 2254 cases* ("*Rule 8*") and *Local Rule 2254-7*, based on his asserted need for further expansion of the record to support his claim of ineffective assistance of counsel. Relying on *Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005)*, petitioner argues he is entitled to an evidentiary hearing because he has presented a colorable claim of ineffective assistance of counsel and the state court's decision was based on an unreasonable determination

[*59]

of facts.

In an opposition motion submitted on October 1, 2007 the State argued that a hearing should not be granted for three reasons. First, petitioner is not entitled to such hearing because he has not met the requirements of *28 U.S.C. section 2254(e)(2). Section 2254(e)(2)* requires petitioner to have developed the factual basis for his claim in state proceedings, or in the alternative to show that a new rule of constitutional law or new factual predicate is the basis of his claim. Second, even if the factual allegations were established to be true, they would not support a finding that the offending conduct was prejudicial. Third, petitioner did not comply with local rule 2254-7(a), which requires both that a request for an evidentiary hearing be made within 15 days from the expiration of the time for filing a traverse and that the request specify which factual issues in particular require a hearing and what evidence will be offered.

The State correctly points out that petitioner has not complied with the timing requirements of the local rule for filing his request. However, petitioner counters that the court has an independent duty under *Rule 8* to determine whether an evidentiary

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hearing is warranted--whether mandatory or merely desirable. Petitioner also asserts his failure to request an evidentiary hearing in the state court proceedings is excusable because he

had no practical ability to make such a request since the state appellate court never issued an order to show cause, which he argues was a necessary precursor to raising the issue.

Claims which can be resolved on an existing record do not warrant a federal evidentiary hearing. *Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999).* Although mindful of its obligations, this court will not grant petitioner an evidentiary hearing because the court finds the factual determinations made by the appellate court below in resolving the ineffective assistance of counsel claims to be reasonable for the reasons previously stated. See *Earp, 431 F.3d at 1166-67* ("Because a federal court may not independently review the merits of a state court decision without first applying the AEDPA standards, a federal court may not grant an evidentiary hearing without first determining whether the state court's decision was an unreasonable determination of the facts."). Petitioner has failed to sufficiently demonstrate what, if

[*61]

any, new facts could be established during such a hearing that would undermine the reasonable determination of the Court of Appeal below that the offending conduct, even if true, was not prejudicial.

V. Cumulative Error

This court recognizes that in some instances it is appropriate to consider the cumulative effect of several errors that otherwise viewed separately would not result in a sufficient degree of prejudice to warrant reversal. See *Alcala v.*

Woodford, 334 F.3d 862, 893-95 (9th Cir. 2003). Petitioner, however, is unable to establish any federal constitutional error whatsoever, let alone an accumulation of errors. Therefore, no basis for finding cumulative error exists. See *Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999)* (where no single constitutional error exists "nothing can accumulate to the level of a constitutional violation."); accord *Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002)* ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

CONCLUSION

Because petitioner has faiied to demonstrate any error rising to the level of actual prejudice, or any combination of errors that taken

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together rise to such level, the petition for writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: February 13, 2008

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
United States District Court Judge
Northern District of California

b. California Court of Appeal Opinion

THE PEOPLE, Plaintiff and Respondent,
v.
HAROLD MORALES, Defendant and Appellant.

In re HAROLD MORALES, on Habeas Corpus.

A102198, A108550

COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FOUR

2005 Cal. App. Unpub. LEXIS 6377

July 20, 2005, Filed

NOTICE: [*1]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: Alameda County Super. Ct. No. CH27122.

DISPOSITION: The judgment is affirmed. The petition for habeas corpus is denied.

JUDGES: RIVERA, J.; REARDON, Acting P.J., SEPULVEDA, J. concurred.

OPINION BY: RIVERA

OPINION

Harold Morales appeals from a judgment of conviction upon a court verdict of first degree murder (Pen. Code, § 187). The court also found true the allegation that defendant was armed with a deadly weapon and that he inflicted great bodily injury (§§ 12022, subd. (b), 1203.075, 12022.7, subd. (d)). Defendant raises numerous issues on appeal including that the trial court relied on several erroneous definitions in reaching its verdict, that it erred in its evidentiary decisions, and that the prosecutor committed misconduct. In a petition for habeas corpus, which we consider with this appeal, defendant argues that his trial counsel was ineffective.

[*2]

We affirm the judgment and deny the petition.

I. FACTUAL BACKGROUND

On the evening of October 8, 1998, Nazaneen Omar had just completed her first quarter at Heald College and wanted to celebrate with defendant, her boyfriend. Omar left the house between 4:30 and 6:00 p.m.

Frank Bryan lived on Jamison Way in Castro Valley. On the evening of October 8, at about 8:00 p.m., Bryan and his wife were walking their dog and going to Safeway. As they walked, their dog became very anxious and began growling and barking. Bryan then heard screaming and a horn honking. He heard a female voice screaming "Oh, God, help." Bryan's dog was pulling him in the direction of a red car that was parked nearby. Bryan could also hear a male voice that was yelling and argumentative. He looked over toward the red car and saw a couple in the car arguing. He also saw a man get out of the car and go over to the passenger side and force the passenger door to close. After he forced the door to close, he got back in the car. Bryan and his wife went to Safeway to call the police.

Janeen Leech was in the vicinity of Redwood Road and Wilson Avenue in Castro Valley at about 8:00 p.m. on the evening of October

[*3]

8. She heard a car's horn honking on Wilson Avenue and saw that the sound was coming from a red hatchback car. She noticed that the passenger door of the car was open and swinging back and forth. The car was going fast but stopped suddenly when Leech heard a thud. Leech walked toward the car which was now on Redwood Road and saw a man scoop up what she thought was a dummy and put it back in the car. The dummy appeared to be a human form with long hair, wearing skintight pants, a short top and jacket, and black bulky shoes. Leech did not see the dummy move so she thought it was a teenage prank. But when the car took off, she noticed a splatter of red on the passenger door window and decided to call 911.

When sheriff deputies arrived, Leech went with the deputies to the area where the car had stopped; a puddle of blood was there.

Gary Eoff was also driving on Redwood Road that evening. He saw a red car stopped in the middle of the street with the driver's door open. He also saw a man bending down over something outside the car. He stopped his car about 20 feet away and asked the man, "what's up." Eoff then saw the man pick up a girl from the ground and throw her inside the car. The

[*4]

man got in the car and drove away. Eoff pursued him while his wife tried to write down the license plate number. The man was driving fast and running stop signs so Eoff stopped following him. He went back to the area where he had observed the incident and saw sheriff's cars in the parking lot of a convenience market. He reported the incident to the sheriff deputies.

At approximately 8:00 p.m., Samuel Dorrough and his daughter walked from the driveway of their home at 3612 Jamison Way in Castro Valley to the recycling bins located on the sidewalk. As they approached the bins, Dorrough heard a woman screaming. The screams were coming from a red car across the street. Dorrough heard the woman scream three times; each time her scream was cut short. He also heard the red car's horn blaring. Dorrough returned to his home to get his phone. He walked back outside and called 911. He heard the sound of a car trunk closing but not catching. He then saw the red car drive away and turn left on Jamison Way. He noticed that the only person in the car was a male. Sheriff deputies responded to the

scene a few minutes later. Dorrough went to Safeway after talking to the deputies. When he returned,

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the deputies were still at the scene. Dorrough then saw the same red car coming down the street.

Deputy Sheriff Buschhueter responded to the scene. Approximately 45 minutes later, he was directed to a car turning onto Aires Court. Buschhueter and other deputies followed the car. The car was parked on Aires Court and was unoccupied. There was a large amount of blood throughout the interior of the car and a knife was on the dashboard. While the deputies were investigating the car, a woman called out for help from the balcony of the townhouse nearby. They responded to the townhouse where the woman told them that her son was trying to hurt himself. Buschhueter saw defendant and another man struggling over a large knife. When the deputies approached the men, defendant had the knife. He started to use the knife on his neck and he was covered in blood. He ran into the bedroom and prevented the deputies from entering. Defendant said that he wanted to die, his life was over, she had left him, he had no reason to live, and he wanted to talk to his mother. When Buschhueter kicked the lower hinge to the bedroom door, defendant ran to the balcony and jumped to the ground.

Defendant landed flat

[*6]

on the ground, but immediately got up and started to run away. Deputy Burnham and other officers were able to detain him. Burnham observed that defendant had a deep cut in his throat. After defendant was on a gurney, Sergeant Jay learned that defendant had a girlfriend who might be connected with the earlier incident in the parking lot. Sergeant Jay also learned that a purse found in the red car belonged to defendant's girlfriend, Omar. She asked defendant about Omar's whereabouts. Defendant responded that he wanted to talk with his mother.

Burnham accompanied defendant in the ambulance to the hospital. Burnham made further inquiries of defendant concerning the whereabouts of his girlfriend. Defendant told him that they had just broken up and that she was despondent over the break up and had taken an overdose of pills. Defendant told Burnham that he left her on Center Street in Castro Valley. Paul Lightfoot, defendant's stepfather, testified that on the evening of October 8 he had fallen asleep early. His wife woke him up and told him that defendant was trying to kill himself. Lightfoot got out of bed and saw Harold with a knife in the hallway. Lightfoot tried to restrain him and

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they struggled. Defendant told him, "please don't stop me, I've done something terrible and the police are going to lock me up." Shortly thereafter, the police arrived. The following day when Lightfoot was cleaning up, he found two sets of keys in the area in which he had struggled with defendant. He turned the keys over to the police.

At approximately 10:00 p.m. on October 8, Burnham returned to the scene. Lieutenant Hoig, who was at the scene, found Omar in the hatchback area of the red car. Burnham, who is also an emergency medical technician, assessed her condition and determined that she was dead. She was wearing a black shirt and was nude below the waist. Deputies recovered a bent knife from the dashboard of the car.

Sharon Van Meter, a pathologist, testified that Omar suffered 23 stab and incise wounds and numerous blunt force injuries to her body, particularly to her head and face. One of the stab wounds to Omar's left chest incised her lung; this injury alone would have been fatal without emergency medical treatment. In addition, Omar suffered a skull fracture, which was also, in and of itself, fatal without medical intervention. Dr. Van Meter determined the cause of death

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to be shock and hemorrhage due to multiple stab and incise wounds associated with blunt trauma to the head.

The prosecution also presented evidence concerning several prior acts involving violence or threats by defendant against Omar:

Officer Snider testified that on March 14, 1998, he responded to a call concerning a battery and took a report from Omar. Omar was crying and upset and her left eye had a bruise and was red and swollen when Snider arrived at a residence on Maubert Avenue in San Leandro. Omar reported that she argued with defendant and that he hit her on the leg, chest and left eye with

his fist and then spit on her several times. Omar told Snider that during her two and a half year relationship with defendant, he had assaulted her about 100 times. Omar did not want to file a criminal complaint. She had not previously contacted the police about prior assaults because she did not want to get defendant in trouble.

Detective Beverly Young testified that on April 14, 1998, she was on patrol and responded to an incident occurring at the Southland Mall in Hayward. There, she met Omar, who was extremely upset and crying hysterically. The right rear window of her BMW had been

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broken. Omar told Young that she had broken up with defendant after dating him for some time. Defendant was calling her and threatening her and had stopped by the mall to try to talk to her. He subsequently called her and told her to meet him by her car when she got off work. When she refused, he said he was going to break her car window.

Omar told Young that defendant had threatened to kill her on prior occasions and that she was afraid. Referring to the incident at the mall, Omar told Young that defendant said "you fucking bitch. I'm going to end your life." Omar showed Young bruises that she had on her inner thighs and arms that were the result of an assault by defendant four days prior to the incident in Hayward. Young testified that the bruising was consistent with Omar's claim. Omar said that she did not want to involve the police because defendant threatened to kill her if she did so.

Officer Huy Tran testified that on July 10, 1998, he responded to a report of a domestic disturbance at the Great Mall in Milpitas. Omar told Tran that she dated defendant for about three years but broke up with him approximately eight months ago. She had gotten back together with him four days

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before but had broken up with him again the previous evening. Defendant was angry about the break up and called her at work threatening to kill her. At approximately noon that day, defendant approached her at her work site and whispered in her ear, "I'm going to kill you. This is not a joke." She became upset and yelled at him to stop harassing her. Defendant yelled obscenities at her and threw a shoe at her grazing the right side of her head. A security mall officer chased defendant away.

Omar requested a restraining order. Tran was able to obtain an emergency protective restraining order for her. Omar told Tran that she wanted to press charges. On September 4, 1998, Omar recanted her statement, claiming that she was upset the day of the incident and that defendant had not threatened her or hit her with a shoe.

The fourth incident occurred on August 2, 1998. Police Chief Norman LaPera of the East Bay Regional Park Police Department was on patrol traveling northbound on Redwood Road at about 8:00 p.m. He pulled up alongside a car that was in the lane adjacent to his and saw that Omar, the passenger in a maroon Honda was crying. He heard her say "no" and "leave me alone." He made

[*11]

eye contact with her and she mouthed the words, "help me." LaPera then saw defendant, who was driving the car, reach over with his right hand and grab Omar by the back of her hair and pull her close to him. Defendant began to choke her. Defendant tried to keep her from looking in LaPera's direction.

LaPera alerted dispatch that he was going to make a traffic stop in a domestic violence incident. When he was trying to get in position, Omar exited from the car. LaPera got out of his car and directed Omar to get in his car. Omar was crying and telling LaPera that defendant was trying to hurt her. Defendant got out of his car and followed Omar, swearing at her and telling her to get back in the car.

When the light at the intersection changed to green, LaPera directed defendant to move his car through the intersection and to pull over. As they followed defendant through the intersection, Omar told LaPera that defendant planned to drive her up to Redwood Road and kill her. After LaPera stopped his car behind the Honda, defendant got out of the car and started to yell at Omar to get back in his car. LaPera put defendant into a control hold to physically restrain him. Defendant resisted

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but LaPera was able to handcuff defendant.

Deputy Sheriff Andrade arrived and took defendant into custody. Andrade spoke with Omar and observed a three-inch abrasion on the back of her neck, an abrasion on her chest area,

and superficial scratches on her neck and wrist. Omar was crying, very emotional, and distraught. Andrade was eventually able to obtain a written statement from Omar in which she related that defendant said he was going to kill both of them and when he saw the officer, he threatened to kill her if she got out of the car.

In defense, defendant presented several witnesses who testified about defendant and Omar's tumultuous relationship and that they were abusive to each other. They used aggressive language and profanity, and were jealous of each other. Omar was often angry with defendant because he had other girlfriends. A few weeks before her death, Omar approached defendant when he was talking to a friend and accused him of having a sexual relationship with her. Omar also knew how to "push [defendant's] buttons" by casting aspersions on his masculinity; he would respond by pushing her back and telling her to quit. In short, according to defendant's friend, the

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relationship was "crazy for both of them."

The parties stipulated that DNA tests of the blood on the knife found in the car showed that Omar could not be excluded as a major contributor and that defendant could not be excluded as a minor contributor of the blood.

II. DISCUSSION

A. Instructional Errors

Defendant contends that the trial court relied on erroneous definitions of premeditation and deliberation in concluding that he was guilty of first degree murder. He argues that the court's comments that defendant " 'had talked about the threat of murder before' " and that "to constitute a deliberative, premeditated killing [defendant] must have weighed and considered the question of killing and reasons for and against such a choice," indicate the court relied on defendant's past intent to kill Omar as constituting premeditation for her killing.

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 73 Cal. Rptr. 550, the court identified categories of evidence bearing on premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. "Analysis of the cases will show that this court sustains verdicts of first degree murder

[*14]

typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Ibid.*) Defendant contends that there was little or no evidence of planning activity or manner of killing in this case and that the court, thus, relied primarily on defendant's prior threats and actions in finding premeditation and deliberation.

The *Anderson* factors, however, "are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) "In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and

combinations of evidence that could support a finding of premeditation and deliberation." (*Ibid.*)

Here, there was evidence that defendant previously threatened Omar on numerous occasions, and in fact, had threatened to kill her by "cutting" her, virtually the same manner in which he committed the murder. There was also abundant evidence that the manner of the killing demonstrated premeditation

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and deliberation. Defendant stabbed Omar 23 times including a wound to the chest that alone would have been fatal. (See *People v. Hillery* (1965) 62 Cal.2d 692, 703-704, 44 Cal. Rptr. 30 [plunging a lethal weapon into the chest evidences a deliberate intention to kill]; *People v. Perrotta* (1964) 224 Cal. App. 2d 498, 36 Cal. Rptr. 813 [severe and numerous wounds required more than a fleeting period of time to inflict].) He continued to stab her despite her pleas for help and her attempt to flee as she tried to exit the passenger door of the car. As the trial court found, the evidence showed that defendant deliberately intended to kill Omar. "Time elapsed between [the 23 knife wounds]. The repeated knife attack cannot be interpreted as anything other than a willful act. Defendant could have stopped." On this record, the trial court properly found that the killing was deliberate and premeditated. (See *Perrotta, supra,* 224 Cal. App. 2d at pp. 504-505 [nature and extent of injuries inflicted coupled with prior threats point to deliberation and premeditation].)

Defendant next asserts that the court relied on an erroneous definition

[*16]

of an "unconsidered and rash impulse." This assertion lacks merit.

CALJIC No. 8.20 defines deliberate and premeditated murder. It states that "[a] cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation . . . ." (CALJIC No. 8.20.) In finding that defendant premeditated and deliberated Omar's killing, the court remarked on defendant's theory that the killing was a rash impulsive response: "The Court is asked to accept on the one hand that based upon a volatile, demeaning, vicious and harsh relationship that Mr. Morales was pushed to the breaking point and that he killed upon an unconsidered and rash impulse." The court's remarks do not indicate a misunderstanding of the law. To the contrary, the court's comments in their entirety reflect that it considered the evidence presented in light of the theories presented and determined that the killing constituted first degree murder. No error appears.

Defendant also contends that the court erroneously failed to consider imperfect self-defense.

[*17]

We must, however, presume that the court properly applied and followed the law. (Evid. Code, § 664 ["it is presumed that official duty has been regularly performed"].) Here, the court's remarks indicate that it considered defendant's theory of unreasonable

self-defense and rejected it. The court stated that it was "convinced beyond a reasonable doubt that the wounds were not inflicted in self-defense." Again, defendant fails to show that the court erred in applying the law.

Defendant's argument that the court erred in finding that there was no evidence of provocation also misses the mark. The court's comment that there is no evidence to support the defense's suggestion that "something happened in the car to force a rash, impulsive act by Mr. Morales," does not demonstrate that the court placed the burden upon defendant of introducing direct evidence of provocation in the car. The court was simply reviewing the evidence and theories presented and giving its conclusion that the evidence failed to support defendant's theory. The court properly applied the law; defendant was not denied due process.

B. Admission of Prior Acts

Relying on *Crawford v. Washington* (2004) 541 U.S. 36, 158 L. Ed. 2d 177

[*18]

(*Crawford*), defendant contends that statements Omar made to the police concerning prior acts of misconduct were inadmissible because they were unreliable and violated his confrontation rights under the Sixth Amendment. In *Crawford*, the United States Supreme Court held that a testimonial statement by a declarant not present at trial could be admitted only if the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 68-

69.) "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Ibid.*) The *Crawford* court overruled the longstanding rule articulated in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, 65 L. Ed. 2d 597, that the confrontation clause does not bar admission of the statement of an unavailable witness if that statement "bears adequate 'indicia of reliability.' "

The Attorney General argues that defendant waived his confrontation clause challenge by not raising it at trial. Although defendant argued below only that the statements were not trustworthy

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under Evidence Code section 1370, we will consider his claim here since *Crawford* was decided after the trial. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

Defendant contends that Omar's statements to the police were testimonial and, thus, that their admission under Evidence Code section 1370 is barred by *Crawford*. The *Crawford* court declined to "spell out a comprehensive definition of 'testimonial.' " (*Crawford, supra,* 541 U.S. at p. 68.) The court noted, however, that, at a minimum, it applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Ibid.*) The issue of whether statements obtained through police officer questioning

in the field are testimonial is currently pending before our state Supreme Court. (See *People v. Kilday* (2004) 123 Cal.App.4th 406, review granted Jan. 19, 2005, S129567; *People v. Cage* (2004) 120 Cal.App.4th 770,

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review granted Oct. 13, 2004, S127344; *People v. Adams* (2004) 120 Cal.App.4th 1065, review granted Oct. 13, 2004, S127373.) At least one Court of Appeal has held that statements like those at issue here were not testimonial. "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford.*" (*People v. Corella* (2004) 122 Cal.App.4th 461, 469.)

In any event, even if we assume that the statements were testimonial, we conclude that defendant forfeited his right to assert a confrontation clause objection by killing Omar. The *Crawford* court recognized forfeiture by wrongdoing as an exception to its holding that confrontation is a prerequisite to admission of testimonial hearsay statements, explaining that the rule "extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." (*Crawford, supra,* 541 U.S. at p. 62.)

[*21]

The forfeiture doctrine exemplifies the equitable principle that

a defendant who causes a witness's unavailability for cross-examination through his wrongful act may not assert a confrontation clause violation when "competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." (*Reynolds v. United States* (1879) 98 U.S. 145, 158, 25 L. Ed. 244.)

The issue of whether the doctrine of forfeiture by wrongdoing applies where the predicate wrongdoing is the same as the underlying crime is currently pending before our Supreme Court. (*People v. Giles* (Oct. 25, 2004, mod. Nov. 22, 2004, B166937 [nonpub. opn.] review granted Dec. 22, 2004, S129852.) Here, while this is not a case where the defendant caused the witness to be unavailable for the purpose of preventing her from testifying at trial, we conclude that there is no impediment to invoking the forfeiture rule in this case. Recent opinions from other jurisdictions have invoked the forfeiture doctrine in cases where the defendant is charged with the same homicide that rendered the

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witness unavailable, rather than with an underlying crime about which the victim had intended to testify. (See *U.S. v. Emery* (8th Cir. 1999) 186 F.3d 921, 926; *State v. Meeks* (Kan. 2004) 277 Kan. 609, 88 P.3d 789, 794 (*Meeks*).)

Meeks is instructive. There, after the defendant shot the victim, the responding police officer was able to obtain a statement from the victim implicating the defendant. (*Meeks*, *supra*, 88

P.3d at p. 792.) The Kansas Supreme Court held that Meeks forfeited his right to confrontation by killing the victim. (*Id.* at pp. 793-794.) The court reasoned that " 'if the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable* . . . . Bootstrapping does not pose a genuine problem.' " (*Id.* at p. 794.)

We agree with the reasoning in *Meeks*. The rationale for the forfeiture doctrine is pertinent whether or not the defendant

[*23]

specifically intended to prevent the witness from testifying when he committed the act that caused the witness's unavailability at trial. Irrespective of a defendant's intent, equitable principles bar a defendant from benefiting from his wrongful act when his conduct has rendered the victim unavailable to testify.

Since the doctrine of forfeiture by wrongdoing applies here, the confrontation clause did not bar admission of Omar's statements. Nor were the statements inadmissible under Evidence Code section 1370.

Evidence Code section 1370 provides that a statement is not inadmissible under the hearsay rule if the following conditions are met: "[(a)] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the

declarant. [P] (2) The declarant is unavailable as a witness pursuant to [Evidence Code] Section 240. [P] (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [P]

[*24]

(4) The statement was made under circumstances that would indicate its trustworthiness. [P] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official. [P] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [P] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [P] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [P] (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section."

Here, the trial court permitted the People to introduce evidence of several statements Omar made to the police concerning prior acts by defendant pursuant to Evidence Code section 1370. The court found the only issue to be whether the statements were trustworthy. The court found that the statements were trustworthy, noting that there was no litigation pending; that Omar's injuries [*25] were consistent with her complaints; and that though she may have had a bias or motive for fabrication due to her increasingly volatile relationship with defendant, her

demeanor at the time she made the reports suggested she was more likely to be credible. The evidence supports the trial court's ruling.

Each of the prior statements was made under circumstances indicating its trustworthiness. The statements were made immediately following the incidents, and Omar's injuries were consistent with her complaints. While in three of the incidents, she sought to press charges and, hence, could be deemed to have a bias in the proceedings under Evidence Code section 1370, subdivision (b)(1), the evidence overwhelmingly corroborated her complaints. Indeed, in the August 2, 1998, incident, Officer LaPera witnessed the assault on Omar. Moreover, the officers who responded to the scene of the incidents consistently testified concerning Omar's demeanor which further corroborated her statements. On this record, we perceive no error in the court's admission of the evidence. 1

1 *People v. Kons* (2003) 108 Cal.App.4th 514, upon which defendant relies, is inapposite. In *Kons*, the court held that admission of the victim's statement identifying the defendant was inadmissible as a spontaneous declaration and violated the defendant's confrontation rights because it was made at least a day after the attack and lacked particularized guaranties of trustworthiness. (*Id.* at pp. 523-526.) Here, the statements were made immediately following the incidents and there were several circumstances indicating their trustworthiness.

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C. Admission of Tong's Statement

Defendant next contends that the trial court erred in admitting the statement of Michael Tong, a former high school classmate of defendant. Tong testified at trial that he did not recall talking to sheriff deputies on the day he made a written statement. Tong admitted, however, that he probably spoke with a sheriff's deputy about defendant and that he probably made the written statement and signed it, and that it was truthful. The People offered the statement under Evidence Code section 1237 as a writing previously made by a witness. The trial court ruled that the statement could be read into the record pursuant to Evidence Code section 1237. In the statement, Tong related that defendant had introduced him to his girlfriend. Tong said that defendant suspected that she was cheating on him and that about two months prior, they had argued. Defendant told Tong that he threw his girlfriend on the bed and began choking her. Defendant then grabbed a pillow and wanted to suffocate her but he stopped himself.

On cross-examination, Tong admitted that his drug use was the cause of his poor memory and

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that he might have been under the influence of drugs at the time he gave the statement. On redirect, Tong admitted that he told the deputy sheriff the facts set forth in his statement. The trial court denied defendant's motion to strike the testimony.

After the parties rested, the court considered several evidentiary motions. The People requested that the court address defendant's objection to Tong's testimony and said, "I don't know if counsel is still objecting to the admissibility of

that testimony." Defense counsel replied, "No." Following the People's request that the testimony be admitted, the court ruled, "there being no objection, there's no issue." On this record, defendant waived any objection to the admission of the evidence.

D. Exclusion of Omar's Prior Violent Conduct

The trial court excluded evidence that Omar had confronted a girl from her former high school in 1995, exchanged threats, and then driven a car toward her, hitting her. The People moved to strike the evidence under Evidence Code section 1103, arguing that no evidence had been presented to show that Omar engaged in any violent conduct on the day of her murder, hence rendering

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inadmissible any character evidence tending to show a propensity toward violence. The People also maintained that the evidence had nothing to do with defendant and it occurred three years before the murder. The court ruled that the evidence was irrelevant. The court found the incident to be "too remote in time, nature, and scope as to show a significant propensity for violence by Miss Omar. [P] Were this evidence to be admitted, the testimony would have negligible weight in that it was contradictory within itself and was sufficiently discredited in cross-examination so as to be ultimately meaningless. The Court would have thus excluded this evidence under [Evidence Code section] 352 grounds if it had otherwise been deemed relevant."

While Evidence Code section 1103 permits the defense to offer specific acts of the victim to prove her aggressive and violent character (*People v. Smith* (1967) 249 Cal. App. 2d 395, 404, 57 Cal. Rptr. 508; *People v. Shoemaker* (1982) 135 Cal. App. 3d 442, 446-447, 185 Cal. Rptr. 370), the admissibility of the evidence is subject to Evidence Code section 352

[*29]

. "Section 352 directs 'the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption. That section requires that the danger of these evils substantially outweigh the probative value of the evidence." (*People v. Wright* (1985) 39 Cal.3d 576, 588, 217 Cal. Rptr. 212.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, we cannot conclude the trial court abused its discretion in excluding the evidence. There was ample evidence presented through other witnesses that defendant and Omar were abusive towards each other and that they argued frequently. And, the testimony concerning the car incident was weak and contradicted in cross-examination. Given the record, the trial court properly ruled that the evidence was inadmissible.

E. Prosecutorial Misconduct

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Defendant contends that the prosecutor committed misconduct in his closing argument. The Attorney General correctly argues that defendant waived the claim because he failed to object to the argument below. Generally a defendant may not complain on appeal of prosecutorial misconduct if he has not made a timely objection and a request for a curative admission. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) The same rule applies when the trial was to the court. (*People v. Scott* (1997) 15 Cal.4th 1188, 1217 (*Scott*).) Under this rule, none of defendant's contentions regarding misconduct are cognizable. "Even if the prosecutor had engaged in any misconduct, there was no jury to mislead. It is very unlikely the misconduct would have had a significant effect on a trial judge. An objection could easily have cured any harm." (*Ibid.*) In any event, any misconduct was harmless.

Defendant first faults the prosecutor for commenting during his rebuttal argument, "and he sits there right now with that smug little look on his face-oh, now he's going to look down and pout because he doesn't want to look smug. He's going to pout and he's going to huff

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and puff, and he wants mercy. He wants sympathy. He wants what he absolutely steadfastly refused to give Nazaneen Omar when she screamed for help and tried to get out of that car. Tried to get away from him. Tried to save her life. He showed her no mercy. He answered her pleas for mercy with torture

and ultimately with death." Defendant contends that the argument was an unfair comment on his exercise of his privilege not to testify. The Attorney General concedes that a comment on a defendant's court room demeanor is improper. (See *People v. Boyette* (2002) 29 Cal.4th 381, 434.) " 'In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character.' " (*Ibid.*, quoting *People v. Heishman* (1988) 45 Cal.3d 147, 197, 246 Cal. Rptr. 673.)

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To the extent the prosecutor was arguing that the court should find defendant guilty of murder based on his demeanor, he committed misconduct. The comment, however, does not require reversal. The trial was before the court, the comment was brief, and it is extremely unlikely that the court would have been misled by the comment. (See *Scott*, *supra*, 15 Cal.4th at p. 1218.) Moreover, in view of the overwhelming evidence of defendant's guilt, the comment could not have had an impact on the verdict.

Defendant also argues that the prosecutor committed misconduct by the following argument: "The Defense knows perfectly well that the evidence in this case is that this is a crime of murder. The Defense knows perfectly well that this is

not a manslaughter. There is absolutely no evidentiary basis to support a manslaughter. This is a murder." We disagree. The prosecutor's remarks were fair comment on the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Finally, defendant asserts that the prosecutor appealed to the passion and prejudice of the court by arguing that defense counsel's characterization of the case as an intellectual exercise was a charade

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and that the case involved the loss of a human life and belonged to the community. Contrary to defendant's argument, the prosecutor's remarks were not an appeal to the passion of the court to consider the reaction of the community to a verdict of less than first degree murder but simply a refutation of the defense characterization that the case was an intellectual exercise. The comments were not improper.

III. THE HABEAS PETITION

Defendant contends that he was denied the effective assistance of counsel because his counsel failed to present certain evidence and did not object to the prosecutor's closing argument.

In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425, 152 Cal. Rptr. 732.) Effective and competent representation requires "counsel's 'diligence and active

participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if

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the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 80 L. Ed. 2d 674.)

Here, defendant contends that his counsel failed to investigate and present evidence concerning the origins of the knife found in Omar's car. He argues that the evidence would have been relevant to show the absence of planning activity and hence that defendant had not premeditated the killing. Defendant argues that defense counsel should have interviewed his mother who could have testified that there were no knives missing from her house and that the knife found in the car was not similar to any of her knives.

Defense counsel was not ineffective in not pursuing the origin of the knife with defendant's mother. The facts alleged

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in the petition do not prove that defense counsel failed to

investigate the origin of the knife; only that he did not ask defendant's mother about the issue. Absent evidence to the contrary, we must assume that the investigation was adequate. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474.) In any event, evidence of the origin of the knife would not have had an effect on the verdict in view of the overwhelming evidence of premeditation and deliberation.

Defendant also contends that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. As we explained in the appeal, any prosecutorial misconduct was harmless.

IV. DISPOSITION

The judgment is affirmed. The petition for habeas corpus is denied.

RIVERA, J.

We concur: REARDON, Acting P.J. SEPULVEDA, J.